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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No. ~~144~~ 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY, APPELLANT,

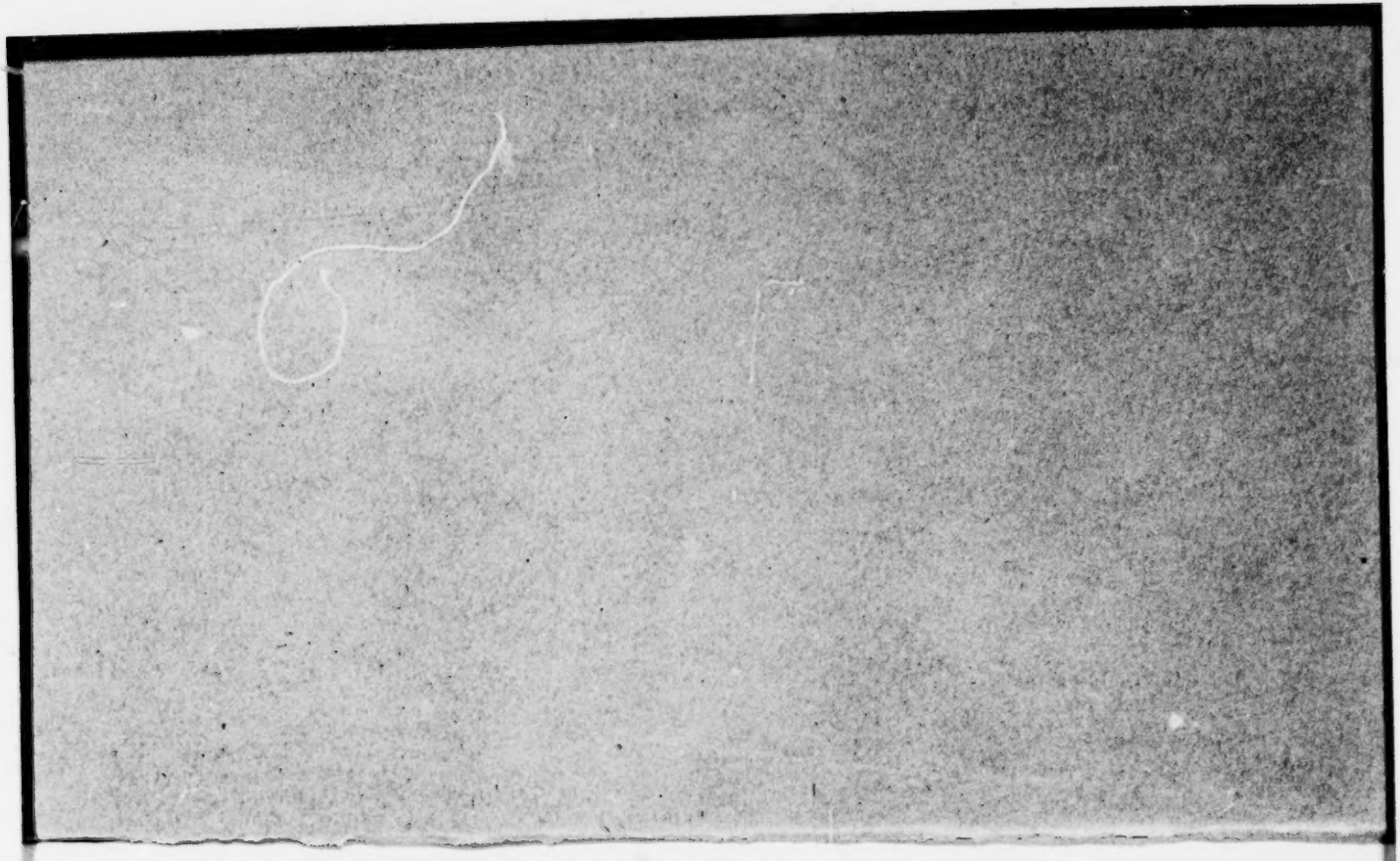
vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 28, 1902.

(18,672.)



(18,672.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

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THE PEOPLE'S GAS LIGHT AND COKE COMPANY, APPELLANT,

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY *vs.* CITY OF CHICAGO.	25780.	In Chancery.

Mr. Nathaniel C. Sears, Mr. James F. Meagher, Mr. Edward S. Whitney, solicitors for complainant.

Mr. John W. Griggs, Mr. W. F. Sheehan, Mr. James F. Meagher, Mr. Thomas A. Moran, of counsel.

Mr. Granville W. Browning, Mr. Charles M. Walker, solicitors for defendant.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY *vs.* CITY OF CHICAGO.	25780.

To the clerk of the above-entitled court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States under the appeal heretofore perfected to said court, and include in the said transcript the following pleadings, proceedings and papers on file, to wit:

Bill of complaint,
Chancery subpœna and return,
Order of January 2, 1901,
Demurrer of City of Chicago,
Order of January 3, 1902,
Amendment to bill,
Opinion,
Order of June 6, 1902,
Amended bill,
Demurrer to amended bill,
Opinion,
Order of July 30, 1902, sustaining demurrer, etc.
Petition on appeal
Assignment of error
Bond on appeal
Order of Sept. 15, 1902 allowing appeal.

Said transcript to be prepared as required by law and the rules of this court and the rules of Supreme Court of the United States and file in the office of the clerk of the said Supreme Court of the United States, at Washington, before October 15th, 1902.

SEARS, MEAGHER & WHITNEY,
Solicitors for Appellant.

3 Pleas in the circuit court of the United States for the northern district of Illinois—northern division, in chancery sitting at the United States court-room, in the city of Chicago, in said district and division, before the Honorable Peter S. Grosscup, circuit judge of the United States for the seventh judicial circuit, on Wednesday, the thirtieth day of July, being one of the days of the regular July term of said court, in the year of our Lord one thousand nine hundred and two, and of our Independence the one hundred and twenty-seventh year.

MARSHALL E. SAMPSELL, *Clerk.*

4 THE PEOPLE'S GAS LIGHT AND COKE Company, a Corporation, *vs.* CITY OF CHICAGO. } 25780. In Chancery.

Be it remembered that on this day to wit: the thirty-first day of December in the year of our Lord one thousand nine hundred came The People's Gas Light and Coke Company, by its solicitors, Winston and Meagher and filed in the clerk's office of said court in the above-entitled cause its certain bill of complaint in words and figures following to wit:

5 *Bill of Complaint.*

UNITED STATES OF AMERICA, *State of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division, to the February Rule Day, A. D. 1901.

To the honorable judges of said circuit court:

Your orator, The People's Gas Light and Coke Company, a corporation respectfully shows unto the court that it is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and that it is and has been engaged in the manufacture sale and distribution of gas in the city of Chicago for many years last past; that its principal place of business is in the city of Chicago; that it is a citizen of the State of Illinois, and a resident and an inhabitant in the northern division of the northern district of said State. That the city of Chicago is a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois, and is a citizen and inhabitant of the northern division of the northern district of said State, that said city of Chicago derives all its powers from the said State of Illinois, and is the creature of the State of Illinois, and that the only powers which are vested in the said city of Chicago are those granted to it under and by virtue of the acts of the legislature of the State of Illinois.

Your orator further shows unto the court that your orator was organized as a corporation to do business in said State under and

by virtue of a special statute of the State of Illinois, approved
6 February 12th, 1855, entitled "An act to incorporate the People's Gas Light and Coke Company," as amended by an act entitled "An act to amend an act entitled 'An act to incorporate the People's Gas Light and Coke Company,' approved February 12th, 1855," which said amendatory act was approved February 7th, 1865.

Your orator further shows that said act of the legislature entitled "An act to incorporate the People's Gas Light and Coke Company" is in the words and figures following, to wit:

"An act to incorporate the People's Gas Light and Coke Company.

"SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly,* That Matthew Laflin, L. C. Paine "Freer, A. G. Throop, D. A. Gage, Jno. S. Wallace, Geo. W. Snow, "H. B. Bay and R. H. Foss, and their associates be and they are "hereby created a body politic and corporate, with perpetual succession, by the name and style of 'The People's Gas Light and Coke "Company,' and by that name they and their successors shall be "capable in law of contracting and being contracted with, suing and "being sued, defending and being defended in all courts and places "and in all matters and places whatsoever, with full powers to acquire, hold, occupy and enjoy all such real and personal estate as "may be necessary and proper for the construction, extension and "usefulness of the works of said company, and for the management "and good government of the same; and they may have a common "seal, and the same may alter break and renew at pleasure.

"SEC. 2. The corporation hereby created shall have full power "and authority, forthwith upon their due organization under this "act, to proceed to the erection of the necessary works for the manufacture of gas and coke, within said city of Chicago and on and "after the 12th day of February, A. D. 1859, to manufacture and "sell gas, to be made from any or all the substances or a combination thereof, from which inflammable gas is usually obtained, and "to be used for the purpose of lighting the city of Chicago or the "streets thereof and any buildings, manufactories, public places or "houses therein contained, and to erect all necessary works and apparatus as aforesaid; and on and after the said 12th day of February, 1859, or sooner by and with the consent of the Chicago Gas "Light and Coke Company, to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the "consent of the city council: Provided, that no permanent injury or "damage shall be done to any street, lane or highway in said city. "The real estate which this corporation is entitled to hold shall not "exceed in value one hundred thousand dollars.

"SEC. 3. The capital stock of said company shall not exceed five "hundred thousand dollars, to be subscribed for and paid in such "proportions as shall be prescribed by the by-laws and rules for "regulating the concerns of said company as they shall think proper "and necessary respecting the management and disposition of the "stock, property and estate of said company, the duties of the officers

"and agents to be employed, the number and election of directors, "and all such matters as appertain to the concerns of said company.

"SEC. 4. It is an express provision of the foregoing act of incor- "poration that the said company shall furnish and supply to the "city of Chicago, for all its public uses, at the election of the 7 "proper authorities of said city, a sufficient supply of gas, at "a rate not exceeding two dollars per thousand feet; and the "inhabitants of said city, at a rate not exceeding two dollars and fifty "cents per thousand feet.

"Approved Feb. 12, 1855."

Your orator further shows that the act entitled "An act to amend an act entitled 'An act to incorporate the People's Gas Light and Coke Company,' approved February 12th, 1885," is in the words and figures following to wit:

"An act to amend an act entitled 'An act to incorporate the People's "Gas Light and Coke Company,' approved February 12, 1855.

"SEC. 1. *Be it enacted by the people of the State of Illinois, repre-* "*sented in the General Assembly,* That the second section of said act "be and the same is hereby so amended as to read as follows viz: "The corporation hereby created shall have full power and authority "forthwith to proceed to the erection and maintenance of the neces- "sary works for the manufacture of gas and coke within said "city of Chicago, and to manufacture, supply and sell gas, to be "made from any and all substances, or a combination thereof, from "which inflammable gas is usually obtained, and to be used for the "purpose of lighting the city of Chicago, any streets, buildings, "manufactories, public places or houses, therein contained, and to "erect and use all necessary works and apparatus for such purposes "aforesaid, and with the consent of the common council of said city, "to lay down and use all necessary pipes for the conducting of gas "in and along any of the streets, alleys, avenues or public squares "of said city: *Provided,* That no permanent injury or damage shall "be done to any such street, alley, avenue or public square by the "laying down of any such pipes.

"SEC. 2. That section three of the said act be and the same is "hereby so amended as to read as follows, viz: The capital stock of "said company shall be five hundred thousand dollars, and may be "increased from time to time, at the pleasure of said corporation, it "may be divided into such shares, subscribed for, paid and trans- "ferred in such proportions and manner as shall be prescribed by "the by-laws and regulations of said company.

"SEC. 3. All the corporate powers of said corporation shall be "vested in and exercised by a board of directors, and such officers "and agents as said board shall appoint. The board of directors "shall consist of not less than three nor more than five stockholders, "who shall be chosen by the stockholders at such time and in such "manner as the said corporation shall by its by-laws prescribe, and "shall hold their office until their successors are elected and quali- "fied, and may fill any vacancies which may happen in the board

"of directors by death, resignation or otherwise; they may adopt "such by-laws, rules and regulations for the government of said "corporation and the management of its affairs and business as they "may think proper, not inconsistent with the laws of this State, and "the fourth section of said act is hereby repealed; but ten years "after the passage of this act the common council of the city of "Chicago may, by resolution or ordinance, regulate the prices "charged by said company for gas; but said common council of the "city of Chicago, shall, in no case, be authorized to compel the said "company to furnish gas at a less rate than three dollars per thou-"sand feet.

"SEC. 4. The said corporation is hereby authorized to borrow "money and to mortgage or lease any of its property or franchises.

"SEC. 5. This act shall be deemed a public act, and noticed as "such by all courts without pleading, and take effect from and after "its passage.

8 "Approved February 7, 1865."

Your orator further shows that after the passage of said act approved February 12th, 1855, as amended by the act approved February 7th, 1865, as hereinbefore set forth, your orator, The People's Gas Light and Coke Company, did act upon the privileges and powers therein granted and did accept the same, and did thereupon proceed to construct gas works in the city of Chicago, and did with the consent of said city proceed to lay mains for the delivery of gas to consumers thereof in the city of Chicago, and did invest many million dollars in the enterprise of constructing gas works and of delivering gas to consumers thereof in the city of Chicago, and that thereby the said charter granted to the People's Gas Light and Coke Company, approved February 12th, 1855, as amended by the amendatory act approved February 7th, 1865, did become and was and now is a contract by and between the said People's Gas Light and Coke Company and the people of the State of Illinois. And your orator further shows that from the date of said act approved February 12th, 1855, as hereinbefore set forth as amended by the act approved February 7th, 1865, as hereinbefore set forth, the said People's Gas Light and Coke Company did continuously thence hitherto remain in and engage in the business of manufacturing, selling and distributing gas in and through the streets of the said city of Chicago, and that the said People's Gas Light and Coke Company is now engaged in the business of manufacturing, selling and distributing gas in the city of Chicago, and that said contract by and between the said People's Gas Light and Coke Company and the said people of the State of Illinois by means thereof still is a contract in full force and effect, and has not been repealed, annulled or canceled.

Your orator further shows unto the court that, relying upon the said contract, your orator has invested its capital and funds in the developement of its business in the city of Chicago, and on the date of the filing of this bill of complaint your orator owns real estate

in the city of Chicago to the value of several millions of dol-
9 lars; that it owns personal property in the said city of Chicago to the value of several millions of dollars; that it has many factories, retorts, plants and other apparatus for the manufacture, sale and distribution of gas in the city of Chicago, and that it has upwards of seventeen hundred miles of pipes and mains laid in the streets of said city, and that it is now engaged in the operation of the plants and apparatus aforesaid, and in the distribution of gas through the pipes aforesaid to the city of Chicago and to the citizens thereof.

Your orator further shows unto the court that under and by virtue of the charter granted to your orator by the people of the State of Illinois, as hereinbefore set forth, which said charter is still in full force and effect, your orator was given, by the legislature of the State of Illinois, full authority touching the management of its affairs and business and full authority to fix such rates as in *the* judgment *of* your orator might deem reasonable, best or proper to charge for the gas sold and delivered by your orator through the pipes laid in the streets of the city of Chicago to the consumers and customers of your orator situated and residing therein; and that by said charter it was provided that the common council of the city of Chicago should in no case be authorized to compel your orator to furnish gas at a less rate than three dollars per thousand cubic feet.

Your orator further shows unto the court that, pursuant to the privileges and powers granted unto your orator by the terms of its charter, as hereinbefore set forth, your orator has, from time
10 to time fixed the rates charged by your orator for gas sold by it in the city of Chicago at such figures as in the judgment of your orator your orator deemed it proper to charge, and has from time to time decreased said rates until the price thereof now charged by your orator for illuminating gas manufactured and sold by it in the city of Chicago to residents thereof and to the city of Chicago is the net rate of one dollar per thousand cubic feet; and your orator further shows unto the court that at the time when your orator was first incorporated and began to do business in the city of Chicago, your orator charged for the gas manufactured and sold by it to the residents of the city of Chicago and to the said city of Chicago a rate much higher than the net rate of one dollar per thousand cubic feet, and that the reductions from time to time made by your orator from the higher rate originally charged by your orator to the net rate of one dollar per thousand cubic feet have been made by your orator of your orator's own free will and voluntary act and have not been by reason of any ordinance of the city of Chicago compelling or attempting to compel your orator to make any reduction or reductions in the price charged by your orator for the gas sold and delivered by it in the city of Chicago to residents thereof and to the city of Chicago; and your orator here shows that the city of Chicago itself is a customer of your orator and has been for many years last past, and that its bills as a consumer of the gas manufactured and sold by your orator during the year 1899 and consumed

by said city of Chicago amounted to upwards of five hundred and fifty thousand dollars, and that the bills for gas manufactured, sold and delivered by your orator to the city of Chicago, and consumed by the said city of Chicago, for the year 1900, amounted to upwards of four hundred and ninety thousand dollars,

11 that the city of Chicago is a customer of your orator in the same sense and in the same way and under the same legal conditions as each and every customer of your orator in the city of Chicago; and your orator further shows unto the court that it has never delivered gas to the city of Chicago except upon contract first made by and between your orator and the city of Chicago, and that it has never delivered gas to any customer or patron in the city of Chicago except upon contract first made by and between said customer and your orator, and in each and every of said cases your orator has determined what the price should be for the gas to be furnished by your orator to such customer and to the city of Chicago in accordance with the privileges and powers granted to your orator in its charter as aforesaid.

Your orator further shows unto the court that notwithstanding the privileges and powers conferred upon your orator by its charter as aforesaid, and notwithstanding the inhibition contained in said charter, providing that the common council of the city of Chicago should in no case be authorized to compel your orator to furnish gas at a net rate less than three dollars per thousand cubic feet, and notwithstanding the contract thereby existing by and between your orator and the people of the State of Illinois, the said common council of the city of Chicago, as representing said city, did recently arbitrarily, unlawfully and unwarrantably, claiming that it has the power to regulate the price of gas sold and distributed by your orator in the city of Chicago to the city of Chicago and to residents thereof, and without investigation or judicial proceedings of any kind, and without giving or permitting a hearing of any sort to your orator, on or about the fifteenth day of October, 1900, did pass a certain ordinance, which said ordinance is in the words and figures following to wit:

"Be it ordained by the city council of the city of Chicago:

SECTION 1. That no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the

12 city of Chicago for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1000) cubic feet of gas consumed or used. Said sum of seventy-five (75) cents per one thousand (1000) cubic feet of gas shall be the net price charged, exacted, demanded or collected from each consumer. Manufactured gas so furnished shall afford a light of not less than twenty (20) candle-power, to be measured and ascertained at the place of consumption in said city by the most modern appliances known to science for measuring the candle-power of illuminating gas.

Provided, however, that any corporation, company or companies,

firm or person distributing or selling gas for fuel or illuminating purposes in the city of Chicago may, in addition to said seventy-five (75) cents per one thousand cubic feet of gas furnished to such consumer, add a penalty of not exceeding ten (10) cents for each one thousand (1000) cubic feet of gas so supplied to such consumer for delinquency or non-payment of the bill, statement or charge of said corporation company or companies, firm or person after ten days from the date at which said bill, statement or charge is made and furnished to such consumer.

SECTION 2. That any company, corporation, person or persons who shall remove any meter or meters from the house, store, factory or premises of any consumer of gas in the city of Chicago, against the will and consent of any such consumer of gas who is willing to pay for gas furnished him, it or them by any such company, corporation, person or persons, and tenders the amount due at the price established and fixed in section 1 of this ordinance, shall be subject to a penalty of not less that twenty-five (25) nor more than two hundred (200) dollars for each and every offense, provided, however, that any company corporation, person or persons furnishing gas to consumers in the city of Chicago shall have the right to remove any meter or meters for the purpose of repairing the same, on condition that such meter or meters so removed shall be replaced or a new one substituted in its place within twenty-four (24) hours of the time of the removal of any such meter or meters.

SECTION 3. That any company, corporation, person or persons who shall, in violation of the provisions of the preceding sections, charge or require the city of Chicago, or any citizen thereof, or any consumer of gas therein, to pay for gas furnished to it or them, or either of them, a sum in excess of seventy-five (75) cents per thousand cubic feet, or who shall furnish to the said city of Chicago, or any citizen thereof, manufactured gas less than twenty (20) candlepower shall be subject to a penalty of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00) for each and every offense.

SECTION 4. This ordinance shall be in full force and effect from and after the 2nd day of January, A. D. 1901, provided, that said ordinance shall not go into effect until it has been duly published, as provided by law."

Your orator further shows that the said ordinance was not thereafter vetoed, repealed, modified or amended, and that the same remains in full force and effect, as the enactment of said common council of the city of Chicago, and of said city of Chicago.

13 Your orator further shows unto the court that the history of the passage, of said ordinance by the common council of the city of Chicago is as follows: Your orator shows that at a meeting of the common council of the city of Chicago, held on the twenty-fourth day of September, 1900, there was presented to said common council for its consideration, by Alderman Patterson, he being then and there a member of said common council, an ordinance regulating and fixing the maximum price of gas, which said ordinance was there-

upon referred to the committee on judiciary, that being one of the regular organized committees of said common council; that on the same date there was presented by Alderman Eisfeldt, he being then and there an alderman of the city of Chicago and a member of the common council, an ordinance concerning the distribution and price of gas which was also referred to said committee on judiciary; that afterwards, to wit: on the first day of October, 1900, at the next meeting of the said committee on judiciary, the said committee on judiciary did report unto the said common council of the city of Chicago upon the said two ordinances presented as aforesaid by Alderman Patterson and Eisfeldt respectively, and recommended in lieu thereof the ordinance hereinbefore set forth as having been passed by the said common council of the city of Chicago, which said report was thereupon deferred and published.

Your orator further shows unto the court that the membership of said committee on judiciary of the common council of the city of Chicago is composed largely of attorneys and counsellors at law, engaged in the practice of the law in the city of Chicago, State of Illinois, and that the said committee on judiciary did before the presentation of the ordinance aforesaid make a careful investigation of the rights and powers of the said city of Chicago, and that the said committee on judiciary did report the same to the common council of the city of Chicago, believing that there was vested in the said city of Chicago full and ample authority to regulate and fix the price of gas to be charged by your orator for the gas manu-
14 factured, sold and distributed by it to the city of Chicago and to the residents thereof; and your orator further shows unto the court that the common council of the city of Chicago passed said ordinance believing and claiming that it, the said common council of the city of Chicago had full and ample power and authority to regulate the price of gas sold and distributed by your orator to the city of Chicago and to the residents thereof.

Your orator further shows unto the court that the said common council of the city of Chicago duly passed the said ordinance aforesaid, having first had the advice of its committee on judiciary which recommended the passage of the ordinance as the same was passed.

Your orator further shows unto the court that on the twenty-sixth day of May, 1899, the corporation counsel of the city of Chicago reported to said common council of the city of Chicago that under a decision recently announced by the supreme court of the State of Illinois he believed it to be the law that if the case were presented to the courts of the State of Illinois the courts of the State would hold that there was vested in municipal corporations under the general police power granted to them by the statutes of the State of Illinois the right to regulate the demands and rates charged by quasi-public corporations.

Your orator further shows unto the court that the said common council of the city of Chicago, in the passage of the ordinance hereinbefore set forth as having been passed by said common council on October 15th, 1900, relied not only upon the recommendation and

advice of its said committee on judiciary, composed of attorneys and counsellors as aforesaid, but also relied upon the opinion of the corporation counsel of the city of Chicago rendered to it as aforesaid on the twenty-sixth day of May, 1899, at a regular meeting thereof.

15 Your orator further shows that under and by virtue of the general police powers claimed by the city of Chicago to have been granted to it by the legislature of the State of Illinois, the city of Chicago has assumed the right to regulate and fix the price at which gas shall hereafter be furnished by your orator to the citizens of the city of Chicago and to the city itself.

Your orator further shows unto the court that the said city of Chicago so claims the said right as aforesaid regardless of the privileges and powers conferred upon your orator by its charter from the State of Illinois and of the inhibition contained therein.

Your orator further shows unto the court that the said ordinance of the city of Chicago was passed in good faith by the unanimous vote of the members of the said common council of the city of Chicago being in attendance upon said meeting on October 15th 1900, which your orator shows was a regular meeting of said common council; and that the said city of Chicago announces and has announced that on and after the second day of January, 1901, it will enforce the said ordinance against your orator in the event of any violation of the terms thereof by your orator; and your orator further shows unto the court that your orator has been advised by sundry citizens of the city of Chicago that in the event of the failure of your orator to comply with the terms of the ordinance so passed by the said city of Chicago as aforesaid, they would immediately take steps by means of prosecutions in the courts of the State of Illinois to enforce the penalties provided by said ordinance upon your orator in the event of a violation by your orator of any of the terms of said ordinance as aforesaid.

Your orator further shows unto the court that it has now upwards of three hundred thousand (300,000) customers in the city of Chicago, in addition to the city of Chicago itself, to which

16 your orator is daily selling and distributing gas, and that during the year 1900, your orator sold and delivered to such customers at the rates specified an enormous amount of gas, aggregating many million cubic feet; and that on the date of the passage of said ordinance your orator was engaged in selling illuminating gas to said customers, including the city of Chicago, at the net rate of *old* dollar per thousand cubic feet, which said net rate of one dollar per thousand cubic feet your orator had fixed as the price of its illuminating gas sold and delivered in the city of Chicago and which said rate so fixed by your orator had been charged by your orator in the city of Chicago for some two or three years last past.

Your orator further shows unto the court that it fixed the said rate of one dollar net per thousand cubic feet pursuant to the privileges and powers conferred upon your orator by its charter as aforesaid, and because in the judgment of your orator it was a just fair and

proper rate for your orator to charge for its illuminating gas as aforesaid.

Your orator further shows unto the court that if, after the second day of January, 1901, your orator should fail to comply with the terms of said ordinance, and should decline to furnish gas at the rate fixed therefor in said ordinance, but on the contrary should continue to demand of its customers the rate which your orator has fixed as being the just, fair and proper rate for your orator to charge to said customers,—that is to say, should continue to charge said customers one dollar net per thousand cubic feet for gas sold and distributed to them—then under and by virtue of the terms of said ordinance any customer of your orator in the city of Chicago could begin a prosecution against your orator for the violation of
17 the terms and conditions of said ordinance; and your orator charges the fact to be that in the event of the failure of your orator to comply with the terms and conditions of said ordinance many thousands of such suits will be started by the customers of your orator in the city of Chicago, in addition to such suits as the city of Chicago might see fit to start in attempting to enforce the provisions of said ordinance; and your orator shows unto the court that thereby and by means thereof your orator would be subjected to a multiplicity of suits, that it would be subjected to enormous expense in defending the same, that by reason thereof your orator would be unable to attend to its ordinary and legitimate business pursuant to the privileges and powers conferred upon it by its charter from the people of the State of Illinois, and that the litigation arising therefrom would be endless and that the suits arising thereby would be numberless.

Your orator further states unto the court and charges the fact to be that in the event of the failure of your orator to comply with the terms and conditions of said ordinance, the said city of Chicago will, on and after the second day of January, 1901, attempt to enforce the provisions of said ordinance and to compel your orator to comply therewith. And your orator charges the fact to be that in pursuance of such effort, on the part of said city of Chicago, to compel your orator to comply with the terms and conditions of said ordinance, the said city of Chicago will begin, or cause to be begun, an enormous number of such suits, and will thereby harrass and disturb your orator, in the pursuance of its business aforesaid, and will make it impossible for your orator to conduct its business, as aforesaid, in the said city of Chicago, because thereof.

Your orator further shows unto your honors that the powers and privileges conferred upon your orator, by its said charter, to
18 fix the rates of the gas sold and distributed by your orator, is a property right, and as such is protected by the Constitution of the United States and the laws thereof.

Your orator further shows unto the court that the passage of said ordinance and the enforcement thereof, by the common council of the city of Chicago, is and will be an attempt upon the part of the said city of Chicago to reduce the price of the gas manufactured sold and distributed by your orator in and through the city of Chi-

cago, in violation of the contract between your orator and the people of the State of Illinois, as hereinbefore set forth, and is a violation of the rights of your orator, as guaranteed by the fifth amendment to the Constitution of the United States, wherein and whereby it is provided that no person shall be deprived of life, liberty or property, without due process of law; that it is a further violation of the rights of your orator as guaranteed to it by the fourteenth amendment to the Constitution of the United States of America, wherein and whereby it is provided that no State shall deprive any person of life, liberty or property without due process of law; that it is a further violation of the rights of your orator, as guaranteed to your orator by the first paragraph of section 10 of article 1 of the Constitution of the United States of America, wherein and whereby it is provided that no State shall pass any law impairing the obligation of contracts; that it is a further violation of the rights of your orator, as guaranteed to it by the Constitution of the United States of America, in that it denies to your orator the equal protection of the law, all of which constitutional guaranties this complainant invokes and relies upon.

Your orator further shows unto the court that the price fixed by the common council of the city of Chicago, in the ordinance hereinbefore set forth, is an unreasonable price; that your orator cannot sell and distribute gas at said price to the residents of the city
19 of Chicago and make therefrom a reasonable profit upon the amounts invested by your orator in its business of manufacturing, selling and distributing gas; that the enforcement of said rate would bring ruin and detruction to your orator financially and would force your orator into insolvency.

Your orator further shows that the enforcement thereof would cause your orator the loss of many millions of dollars; that the exact amount which your orator would lose from its enforcement your orator is unable to state, but that it is largely in excess of two thousand dollars.

Your orator further shows that the enforcement of said ordinance would amount to a confiscation of your orator's property in violation of the Constitution and laws of the United States, and of all amendments thereto.

Your orator further respectfully submits unto the court that in the opinion of your orator no power was, by the legislature of the State of Illinois, or now is, conferred upon the city of Chicago, to regulate the price of gas sold and distributed by your orator in the city of Chicago, except as it is provided in said charter, as hereinabove set forth, and your orator therefore charges the fact to be that the city of Chicago has not the power to compel your orator to charge less for the gas sold and distributed by it than three dollars per thousand cubic feet, and that the said ordinance is, in all respects, null and void. Nevertheless, your orator shows unto the court, as hereinbefore set forth, that the city of Chicago intends to and will enforce the provisions of said ordinance, in the event the enforcement thereof is not prohibited by the order of this honorable court

Forasmuch, therefore, as your orator is without remedy save in a court of equity, where such matters are properly cognizable your orator prays that the City of Chicago and the citizens thereof, who are hereby made parties defendant to this bill, may be required to make full and direct answer to the same, to the next return
20 day of this court, but not under oath, answer under oath being expressly waived, that on the filing of this bill of complaint the usual writ of injunction may issue forthwith against the City of Chicago, restraining and enjoining its mayor, its chief of police, city attorney, corporation counsel, agents, servants and employees, and all and singular its other executive officers, and each every and all of the citizens of Chicago, from in any way enforcing or attempting to enforce said ordinance entitled "An ordinance regulating and fixing the price of gas in the city of Chicago," or any of the provisions thereof, against your orator, or from in any way interfering with your orator or with said property or business, by reason of anything in said ordinance contained, until the further order of the court herein, and that upon the final hearing hereof the said ordinance so passed by the common council of the city of Chicago, on the fifteenth day of October, 1900, may be adjudged and declared to be invalid, illegal, null and void and of no further force and effect, and that the said City of Chicago, its mayor, chief of police, city attorney, corporation counsel, agents, servants, and employees, and all and singular its other executive officers and each, every and all of the citizens of Chicago, may be permanently enjoined and restrained from enforcing or attempting to enforce, the same or any of the provisions thereof, against your orator, or from in any way interferring with your orator, its property or business, by reason of anything in said ordinance contained, and that in serving the said City of Chicago and the mayor thereof it may be decreed by this honorable court that the service thereon of said writ of injunction and of such summons as may be sued out herein shall be held by this honorable court to have been service not only upon said City of Chicago, and the mayor thereof, but also upon each, every and all of the citizens of said city, and that your orator may have such other and further relief in the premises as equity may require and to your
21 honors may seem fit; and may it please your honors to grant the usual summons in chancery, directed to the defendant, The City of Chicago, and to the citizens thereof, directing it and them, and each, every and all of them, to be and appear before this honorable court, on the next return day thereof, then and there to answer this bill of complaint.

And this your orator will ever pray.

THE PEOPLE'S GAS LIGHT &
COKE COMPANY,
By C. K. WOOSTER,
Its Vice-President.

WINSTON & MEAGHER, *Of Counsel.*

STATE OF ILLINOIS, } ss.:
County of Cook, }

C. K. Wooster, being duly sworn, on oath deposes and says that he is one of the vice-presidents of The People's Gas Light and Coke Company; that he has read the foregoing bill of complaint and knows the contents thereof, and the matters and things therein set forth. And affiant further says that said bill of complaint, and the matters and things therein set forth, and the charges and allegations therein made, and each and every of them, are true of affiant's own knowledge.

C. K. WOOSTER.

Subscribed and sworn to before me this 31st day of December, A. D. 1900.

[SEAL.] JAMES T. MAHER,
Notary Public.

(Endorsed:) Filed Dec. 31, 1900. S. W. Burnham, clerk.

22 And on to wit: the 31st day of December, 1900, there issued out of the clerk's office of said court in said entitled cause a certain chancery subpœna, which subpœna together with the memorandum thereto attached and the marshal's return thereon endorsed is in the words and figures following to wit:

23 Form No. 186.

UNITED STATES OF AMERICA, } ss.:
Northern District of Illinois, Northern Division, }

The United States of America to City of Chicago, Greeting:

We command you and every of you, that you appear before our judges of our circuit court of the United States of America, for the northern district of Illinois, at Chicago, in the northern division of said district, on the first Monday in the month of February, next, to answer the bill of complaint of People's Gas Light & Coke Company, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this 31st day of December in the year of our Lord one thousand nine hundred, and of our Independence the 125th year.

[SEAL.] S. W. BURNHAM, *Clerk.*

Memorandum.

The above-named defendant is notified that unless it shall enter its appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the

complainant's bill will be taken against it as confessed, and a decree entered accordingly.

S. W. BURNHAM, *Clerk.*

24 [Endorsed:] Marshal's No. —. General No. —. Circuit court United States northern district of Illinois northern division. —— —— *vs.* —— ——. Chancery subpœna. Returnable to rule day, first Monday in —— A. D. 190–. —— —— clerk. —— —— complainant's solicitor.

Circuit Court of the United States of America, Northern District of Illinois, *ss.*

—— ——
vs. } In Chancery.
—— ——.

To —— ——:

Take notice that the complainant will move this honorable court, on the — day of —— A. D. 190– or as soon thereafter as counsel can be heard, that a writ of injunction issue against the within and above named defendant in accordance with the prayer of the bill therein.

Yours, etc.,

—— ——,
Compl't's Solicitor.

Dated this — day of —— A. D. 190–.

25 *Marshal's Return.*

I have served this writ within my district, upon the City of Chicago, a municipality by delivering a true copy thereof to William Loeffler, city clerk of the said city, on the 31st day of December, A. D. 1900.

I was unable to find the mayor of the said city within my district.

JOHN C. AMES,
U. S. Marshal.
WM. E. CASS, *Deputy.*

(Endorsed:) Filed Jan. 3, 1901. S. W. Burnham, clerk.

26 And on to wit: the second day of January, 1901, being one of the days of the regular December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to wit:

Order of January 2, 1901.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
THE CITY OF CHICAGO. } 25780.

This day this cause coming on to be heard upon the verified bill of complaint heretofore filed herein by the People's Gas Light and Coke Company, and upon the motion of said complainant for a restraining order, as prayed for in said bill of complaint, due notice of said motion having been served upon the City of Chicago, and said City of Chicago being now in court by its corporation counsel, upon the stipulation and undertaking of the corporation counsel of the city of Chicago here made in open court that the City of Chicago, its mayor, its city attorney, its corporation counsel, and each of them and each, every and all of the officers, agents, servants and employees of the city of Chicago, will not do, nor permit to be done, any of the matters and things which by the prayer of said bill of complaint the defendant is sought to be restrained therefrom and against, until the final hearing and determination of said motion for an injunction, the motion for a temporary restraining order against said City of Chicago is continued upon said stipulation and undertaking of the corporation counsel until the final determination of said motion for an injunction.

27 And, on motion of the complainant,

It is ordered by the court that, if at any time hereafter any resident or residents, citizen or citizens of the city of Chicago shall enforce, or attempt to enforce, the ordinance passed by the city council of the city of Chicago on October 15th, 1900, entitled "An ordinance regulating and fixing the price of gas in the city of Chicago," or begin any prosecution thereunder, or take any steps or other proceedings thereunder, the complainant shall have leave to forthwith make such resident- or citizens parties defendant to said bill, and that said parties, and each of them, shall thereupon be forthwith enjoined and restrained, as prayed for in and by the bill of complaint filed in said cause.

28 And on to wit: the third day of January, 1902, came the City of Chicago by Granville W. Browning and Charles M. Walker, corporation counsel and filed in the clerk's office of said court in said entitled cause its certain demurrer in words and figures following to wit:

Demurrer of City of Chicago.

UNITED STATES OF AMERICA, } ss:
State of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

PEOPLE'S GAS LIGHT & COKE COMPANY }
vs. } Number 25780.
CITY OF CHICAGO. }

The demurrer of The City of Chicago, def't, to the bill of complaint of The People's Gas Light & Coke Company, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill and for cause of demurrer shows that the complainant has not in and by its said bill, made or stated such a case as entitles it in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill, or any of such matters.

29 Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill and to all the matters and things therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill; and it prays to be dismissed with its reasonable costs in this behalf sustained.

THE CITY OF CHICAGO,
By GRANVILLE W. BROWNING,
Solicitor for Defendant.

CHARLES M. WALKER,
Corporation Counsel, of Counsel.

I certify that in my opinion the foregoing demurrer of The City of Chicago, defendant, to the bill of complaint of The People's Gas Light & Coke Company, complainant, is well founded in law and proper to be filed in the above cause.

GRANVILLE W. BROWNING,
Solicitor for Defendant.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Granville W. Browning on oath states that he is the solicitor of the city of Chicago, and that he has heard read the foregoing demurrer to the bill of complaint of the People's Gas Light & Coke Company, in this suit, and that the same is not interposed for the purpose of delaying said suit, or any proceeding therein.

GRANVILLE W. BROWNING.

Subscribed and sworn to before me, this 3 day of January, A. D. 1902.

[SEAL.] S. W. BURNHAM, *Clerk.*

(Endorsed:) Filed Jan'y 3, 1902. S. W. Burnham, clerk.

30 And on to wit: the third day of January, 1902, being one of the days of the regular December term of said court, 1901, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to wit:

Order of January 3, 1902, *Giving Leave to File Amendment to the Bill.*

PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO. } 25780.

Now come the parties by their solicitors.

Upon motion, leave is hereby granted the complainant to file an amendment to the bill of complaint instanter, the demurrer heretofore filed by defendant to the bill to stand to the bill as amended.

Now comes on to be heard the demurrer to said amended bill, the court after hearing the arguments of counsel in full, takes the matter under advisement.

31 And on to wit: the third day of January, 1902, came the complainant in said entitled cause by its solicitor and by leave of court first had and obtained filed in the clerk's office of said court in said cause a certain amendment to the bill of complaint in words and figures following to wit:

Amendment to Bill.

In the Circuit Court of the United States of America for the Northern District of the State of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO.

Now comes the complainant herein, leave of court being first had and obtained, and amends the original bill of complaint heretofore filed herein by the said complainant, by inserting after the word "thereof," in the third line from the bottom of the thirteenth page of said bill of complaint, and before the word "your," in the second line from the bottom of said thirteenth page of said bill, the following, to wit:

"Your orator further shows unto your honors that, in the business "of manufacturing, selling and distributing gas in the city of Chi- "cago, your orator sells and delivers, as hereinabove set forth, gas to "over three hundred thousand (300,000) customers. That many of "said three hundred thousand customers are people of small means,

"and are financially irresponsible. That your orator renders to "each of its customers monthly statements for the gas consumed by "each of such customers during the preceding month, and collects "therefor within a short time thereafter; that unless said bills are "promptly paid your orator, as is its right and privilege, discon- "tinues the supply of gas to such consumers and that this is the only "method by which your orator is enabled to avoid great loss, by "reason of the failure or inability of your orator's customers and "consumers to pay the bills for the gas consumed by them, as afore- "said.

"Your orator further shows unto your honors that if the city of "Chicago should be permitted to begin prosecutions against your "orator for the failure of your orator to comply with the terms of "the ordinance aforesaid, that thereupon a large number of the cus- "tomers and consumers of your orator would decline to pay your "orator the price fixed by it, as aforesaid, and would refuse to pay "any sum or sums whatsoever to your orator, over and above the "sum fixed by the city of Chicago in the ordinance aforesaid.

"And your orator shows unto your honors that if your orator "should attempt to renew the meters in the houses of such cus- "tomers, or should attempt to discontinue the supply of gas to such "customers, your orator would be immediately subjected to addi- "tional prosecutions and arrests, on the part of the city of Chi- "cago.

32 "Your orator further shows that if, on the other hand, "your orator should permit the bills of such customers to run "until the final determination of such suit, or suits as the city of "Chicago might bring against it, for failure on the part of your "orator to comply with the terms of the ordinance aforesaid, the "outstanding bills of your orator would aggregate an enormous "amount, which your orator is at present unable to calculate, and "which it is impossible to calculate by any means whatsoever. "And your orator shows that by means thereof, and by reason of "the financial irresponsibility of a large number of your orator's "customers and consumers, your orator would be unable, in the "event it was finally successful in defeating the prosecution or prose- "cutions brought against it by the city of Chicago, to collect from "such customers and consumers the amount of such outstanding "indebtedness; and thereby your orator shows unto your honors "that your orator would suffer an enormous loss, the exact amount "of which your orator is unable to calculate, and which your orator "shows unto your honors it is impossible to calculate, in any respect "whatsoever, but which, in the opinion of your orator, would amount "to many hundreds of thousands of dollars; wherefore, your orator "shows unto your honors that the damage to your orator would be "irreparable and incalculable."

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
By C. K. WOOSTER, *Vice-Pres't.*
MEAGHER & WHITNEY, *Its Solicitors.*

JAMES F. MEAGHER, *Of Counsel.*

STATE OF ILLINOIS, } ss:
County of Cook, }

C. K. Wooster, being first duly sworn, on oath deposes and says that he is the vice-president of the People's Gas Light and Coke Company; that he has read the foregoing amendment to the bill of complaint heretofore filed by the People's Gas Light and Coke Company in the above-entitled cause; that he knows the contents of the said amendment, and the matters and things therein set forth. Affiant further says that the said amendment to the said bill of complaint and the matters and things therein set forth, and the charges and allegations therein made, and each and every of them, are true, of affiant's own knowledge.

C. K. WOOSTER.

Subscribed and sworn to before me this 3rd day of January A. D. 1902.

[SEAL.] JOSEPH R. MORRIS,
Notary Public.

(Endorsed:) Filed Jan'y 3, 1902. S. W. Burnham, clerk.

33 And on to wit: the 15th day of January, 1902, there was filed in the clerk's office of said court in said entitled cause a certain opinion in words and figures following to wit:

Opinion.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

PEOPLE'S GAS LIGHT & COKE COMPANY, Complainant,
vs.
CITY OF CHICAGO ET AL., Defendant-.

The bill is to restrain the city of Chicago from putting in force an ordinance passed October 15, 1900, providing that corporations, companies or persons manufacturing, selling or distributing gas in the city of Chicago for illuminating or fuel purposes shall not charge individual consumers more than seventy-five cents per thousand cubic feet, provided the same is paid within ten days from the rendering of the bill, or eighty-five cents per thousand if payment is postponed. The ordinance provides penalties against the company, corporation or person violating its provisions. It is a general ordinance, relating to all manufacturers and distributors of gas in the city, and applicable to the complainant only because complainant happens to be such a manufacturer and distributor of gas in the city.

The bill, in substance, avers that the complainant is now furnishing such gas at the net rate of one dollar per thousand cubic feet, and that the enforcement of the ordinance in question, compelling a reduction, would be in violation of the contract embodied in the

charter of complainant under which its plant was installed and expanded and, therefore, in contravention of the first paragraph
34 of section 10, article 1, of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts; also that its enforcement would be in violation of the fifth amendment to the Constitution, providing that no person shall be deprived of life, liberty or property without due process of law; also in violation of the fourteenth amendment to the Constitution, providing that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws. Unless, however, the complainant's charter constitutes a contract, it is difficult to see how the ordinance would result in depriving the complainant of its property without due process of law, or be a denial to complainant of the equal protection of the laws. The whole case, therefore, in its constitutional aspect, turns upon the question whether the ordinance violates any contract right of complainant as embodied in its charter.

The complainant's charter was by special act of the legislature, approved February 12, 1855, creating it a corporation with the usual powers and liabilities, with a capital stock not to exceed five hundred thousand dollars, and providing in section 4 that the company should furnish to the city of Chicago, for its public uses, gas at a rate not exceeding two dollars per thousand, and to the inhabitants of said city at a rate not exceeding two dollars and fifty cents per thousand.

February 7, 1865, this act was amended, allowing an indefinite increase of capital stock; repealing expressly the 4th section relating to the limit upon price, and providing that "ten years after the passage of the act the common council of the city of Chicago may by resolution or ordinance regulate the price charged by said company for gas, but said common council of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

The contention of complainant is that no matter what may now be the general power of the city in the way of regulating the price of gas, under the constitution of 1870, and the corporation acts coming into force thereafter, the city may not, without impairing the obligation of complainant's contract, fix for complainant, a price
35 at less than three dollars per thousand feet; and the decree invoked is to maintain this supposed constitutional right of inviolability of contract.

The city contends that in the absence of a clear provision in the charter in maintenance of complainant's contention, the general right of cities to regulate the price of gas is applicable to complainant, as well as to other manufacturers or distributors, and that the clause in question embodies no such clear prohibition or limitation as to interfere with the city's general right of regulation of rates. It is insisted that the clause was intended, not as a limitation upon the powers of the city, but as a restriction laid upon the legislature itself in respect of future legislation on the subject involved.

The interpretation of the clause is not free from considerable difficulty. It is not easy to see why the legislature should have intended it as a restriction upon itself or its successors; for, however, precisely or *emphatically* such attempted restriction may have been formulated, it would have been an empty phrase when the succeeding legislature came into existence. Nor is it easy to see how the legislature intended that the prices of 1865, measured by the then depreciated dollar standard, should be made perpetual in favor of complainant, in face of the certainty that the legal-tender dollar would some time rise to its true value, and that, in the course of events, the cost of manufacturing gas would decrease. But in view of the conclusion to which I have come, it is needless to pivot this case upon the interpretation to be put upon this clause.

The Supreme Court of the United States in *Freeport Water Company vs. Freeport City* 180 *U. S.* 587 ruled that under the Illinois constitution of 1870, and the subsequent acts, relating to municipalities and the incorporation of companies, there is reserved in the State the power to prescribe in the government of corporations such regulations as it may deem advisable; and that such right of regulation extends to the fixing, from time to time, of reasonable water rates, unless, possibly (and on this the court refrains from ruling) there be an explicit limitation to the contrary in the ordinance or contract under which the works are installed. It is clear, in the application of this decision to the case under consideration, that, as between the State and any gas companies organized under the constitution of 1870,
36 and the act of the legislature in pursuance thereof, under ordinances, containing no explicit contract relating to minimum rates, there is a reserved power in the State to regulate, within reasonable limits, the rates from time to time. Whether such power has been delegated to the city is an inquiry, that, for reasons stated later, I need not enter upon. In considering the phase of the case I now approach, it is a matter of indifference whether the general power of regulation be in the General Assembly, or in the city as an agent of the State. It is sufficient to the argument that it is lodged somewhere in the instrumentalities of the State.

It was disclosed at argument in answer to inquiries of the court, though not set forth in the bill—that the complainant originally manufactnred and distributed gas upon the west side only, and that its south side and north side system was acquired through merger or purchase of other gas companies under the consolidation act of 1897.

Two of these companies, the Equitable Gas Company and the Consumers' Company, were organized under the constitution of 1870 and the acts in pursuance thereof. The Chicago Gas Light & Coke Company was organized under a special act of February 12, 1849, amended February 9, 1855; but contains no restriction upon the right of the General Assembly, or the city, to regulate from time to time the prices of gas; nor, so far as disclosed, is there in any ordi-

nance or contract between these companies and the city any restriction upon its general right of regulation from time to time.

The act under which the merger of the companies took place, approved June 5, 1897, provides that gas companies organized in Illinois are authorized and empowered to sell, transfer, convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, and that such other gas company is authorized to purchase, lease hold and enjoy such property; also, that gas companies doing business in the same city, town or village may lawfully consolidate and merge into a single corporation (to be one of the merging companies) by complying with a certain proceedure therein specified. A further section of the act provides that the consolidated corporation thus organized shall be subject to the legal obligations now resting upon each of the companies so merged, respect-
37 ively, under their several charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct—none of said companies being in contemplation of the act extinguished.

In answer to an inquiry of the court at argument, counsel for the complainant contended that the merger of the other gas companies with the complainant was the equivalent of the complainant's extension, by original installation, of its works, and pipes into the field occupied by the other companies. Were this so, the supposed restriction contained in the charter of 1855 would follow the merger and extend to the entire system now operated by the consolidated company.

But a little reflection shows this position unsound. The act of 1855 authorizes complainant to erect its works and lay its pipes in the streets and alleys of the city, subject to the consent of the city council. In the absence of consent, no pipes could be laid. It is possible that the city may not, in mere arbitrariness, withhold its consent, where the consent asked for was in the ordinary development of the complainant's plant; but absence of consent, founded on refusal to extend the field for the application of complainant's three-dollar minimum rate, would not be arbitrary. The city council was, therefore, from the organization of the complainant company, in contemplation of complainant's charter, a necessary party to any substantial extension of its plant, carrying the charter restriction as to regulation of rates. No consent of the city has been given to the merger, and therefore, no consent has been given to the enlargement of complainant's franchise, as affected by the limitation in the charter of 1855 relied upon. I do not see how the complainant can, in the absence of such consent, carry over to the territory acquired under the merger its supposed charter exemption from regulation of price. A contrary holding would enlarge the subject-matter of this exemption without the consent of the city—a result that the act of 1855 does not contemplate, but clearly negatives.

The terms of the merger act of 1897, reinforce this conclusion. It specifically provides, as already stated, that the consolidated corpo-

ration shall be subject to the legal obligations now resting upon each of the companies absorbed. One of these obligations is (in the absence of a contrary contract provision) to submit to the
38 State's right of reasonably regulating the price of gas from time to time. In this respect, the consolidated company stands precisely where each of the merged companies stood, and, as we have seen, neither of these was exempt from the State's general right of regulation. In respect to the system acquired through the merger, therefore, the complainant has no contract of exemption under the charter of 1855.

It is obvious then from what has been stated, as against the State's power to reasonably regulate rates from time to time, the complainant, to the extent, at least, that it is successor to the merged companies, enjoys no exemption from regulation. But it is urged that the powers of the General Assembly in this respect are not delegated to the city, and, therefore, however, this reasoning might apply to the powers of the General Assembly, it is inapplicable to any claim of such power upon the part of the city.

I refrain at this time from entering into so far-reaching a question—a question involving the policy of the State respecting the custody of some of its greatest powers. The question thus raised growing out of the interpretation of State statutes, is one primarily belonging to the State courts. My jurisdiction of the case under consideration does not extend to that question, unless its decision, one way or the other, is a necessary predicate to the constitutional question involved. I do not see that it is. If I hold that, under existing legislation, the city has not been delegated with the State's power to regulate rates, it is manifest that the real and adequate reason for annulling the ordinance complained of would be, not any provision of the Federal Constitution, but this lack of power, as shown in the State legislation. On the other hand, if I should hold that the State's power had been delegated to the city, then, according to the reasoning already stated, the injunction prayed for would be refused. Whichever way one looks at this phase of the case, it turns, not on Federal constitutional law, but upon the interpretation of the State statutes, and, is not, therefore, within the meaning of the judiciary act, a case involving the construction of the laws or the Constitution of the United States. If complainant's substantial remedy against the ordinance complained of is lack of power in the city, its relief must be found in the State courts.

Whether, by the merger, the complainant has lost its right
39 to exemption from regulation, to the extent that the consent was given to the installation of its original system, it is not necessary to decide, for the bill asks for no divisional relief. Nor is it necessary to consider the reasonableness of a seventy-five-cent rate, as provided in the ordinance, for no facts challenging the ordinance as unreasonable are set forth in the bill.

I realize that this case is one of great importance, both to the city and to the gas company, and that it may finally be brought under the review of the Supreme Court, and have, therefore, considered it upon a larger survey of the facts than the pleadings before me justify.

I suggest that the bill be amended to bring in these facts, or that the demurrer be withdrawn and an answer filed, bringing them in, reserving the right of demurrer to the bill as it now stands. If the facts thus disclosed are as I apprehend them, an order will then be entered in accordance with the conclusions of the law already stated.

P. S. GROSSCUP,
Circuit Judge.

(Endorsed:) Filed Jan. 15, 1902. S. W. Burnham, clerk.

40 And on to wit: the 6th day of June, 1902, being one of the days of the regular December term of said court, 1901, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to wit:

Order of June 6, 1902, Giving Leave to Amend Bill.

THE PEOPLE'S GAS LIGHT & COKE COMPANY
vs.
CITY OF CHICAGO ET AL. } 25780.

Now come the parties by their solicitors, and the complainant has leave to file its amended bill herein *nunc pro tunc* as of January 15, 1902 and the defendant has leave to file its demurrer to said amended bill *instanter*, and now comes on for argument the demurrer to said amended bill, and the court having heard the same to conclusion and not being sufficiently advised in the premises, takes the same under advisement, with leave to counsel to supplement their oral arguments by briefs to be filed by the last of next week.

41 And on to wit: the fifth day of June, 1902, came the complainant in said entitled cause by its solicitors, and by leave of court first had and obtained filed in the clerk's office of said court its certain amended bill in words and figures following to wit:

42 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
THE CITY OF CHICAGO.

Amended Bill in Equity.

Sears, Meagher & Whitney, solicitors for complainant.
John W. Griggs, W. F. Sheehan, James F. Meagher, Thomas A. Moran, of counsel.

43 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

I.

To the honorable the judges of said circuit court:

And now comes the complainant, The People's Gas Light and Coke Company, and by leave of court first had and obtained files this its amended bill of complaint. And thereupon, humbly complaining, showeth unto your honors your orator, The People's Gas Light and Coke Company, that it is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and that it is and has been engaged in the manufacture, sale and distribution of gas in the city of Chicago for many years last past; that its principal place of business is in the city of Chicago; that it is a citizen of the State of Illinois and a resident and inhabitant of the northern division of the northern district of said State. That the city of Chicago is a municipal corporation organized and existing by virtue of the laws of the State of Illinois, and is a citizen and inhabitant of the northern division of the northern district of said State.

44 II.

Your orator further shows that your orator was organized as a corporation to do business in said State under and by virtue of a special statute of the State of Illinois, approved February 12, 1855, entitled "An act to incorporate the People's Gas Light & Coke Company," as amended by an act entitled "An act to amend an act entitled 'An act to incorporate the People's Gas Light and Coke Company,' approved February 12, 1855," which said amendatory act was approved February 7, 1865. That said act of the legislature entitled "An act to incorporate the People's Gas Light and Coke Company" approved February 12, 1855, is in the words and figures following, that is to say:

"An act to incorporate the People's Gas Light and Coke Company.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly,* That Matthew Laflin, L. C. Paine Freer, A. G. Throop, D. A. Gage, Jno. S. Wallace, Geo. W. Snow, H. B. Bay, and R. H. Foss and their associates be and they are hereby created a body politic and corporate, with perpetual succession, by the name and style of "The People's Gas Light and Coke Company," and by that name they and their successors shall be capable in law of contracting and being contracted with, suing and being sued, defending and being defended in all courts and places and in all matters and places whatsoever, with full powers to acquire, hold, occupy and enjoy all such real and personal estate as may be necessary and proper for the construction, extension and usefulness of the works

of said company, and for the management and good government of the same; and they may have a common seal, and the same may alter, break and renew at pleasure.

SEC. 2. The corporation hereby created shall have full power and authority, forthwith upon their due organization under this act, to proceed to the erection of the necessary works for the manu-
45 facture of gas and coke, within said city of Chicago and on and after the 12th day of February, A. D. 1859, to manufacture and sell gas, to be made from any or all the substances or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago or the streets thereof and any buildings, manufactories, public places or houses therein contained, and to erect all necessary works and apparatus as aforesaid; and on and after the said 12th day of February, 1859, or sooner by and with the consent of the Chicago Gas Light and Coke Company, to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with consent of the city council: *Provided*, That no permanent injury or damage shall be done to any street, lane or highway in said city. The real estate which this corporation is entitled to hold shall not exceed in value $100,000.

SEC. 3. The capital stock of said company shall not exceed $500,000, to be subscribed for and paid in such proportions as shall be prescribed by the by-laws and rules for regulating the concerns of said company as they shall think proper and necessary respecting the management and disposition of the stock, property and estate of said company, the duties of the officers and agents to be employed, the number and election of directors, and all such matters as appertain to the concerns of said company.

SEC. 4. It is an express provision of the foregoing act of incorporation that the said company shall furnish and supply to the city of Chicago, for all its public uses, at the election of the proper authorities of said city, a sufficient supply of gas, at a rate not exceeding $2 per thousand feet; and the inhabitants of said city, at a rate not exceeding $2.50 per thousand feet."

Approved February 12, 1855.

III.

Your orator further shows that the act approved February 7, 1865, entitled "An act to amend an act entitled 'An act to incorporate the People's Gas Light and Coke Company,' approved February 12, 1855," is in the words and figures following, to wit:

46 "An act to amend an act entitled 'An act to incorporate the People's Gas Light and Coke Company,' approved February 12, 1855.

SEC. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the second section of said act be and the same is hereby so amended as to read as follows, viz: The corporation hereby created shall have full power and authority forthwith

to proceed to the erection and maintenance of the necessary works for the manufacture of gas and coke within said city of Chicago, and to manufacture, supply and sell gas, to be made from any and all substances or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, any streets, buildings, manufactories, public places or houses therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, and with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues or public squares of said city: *Provided*, That no permanent injury or damage shall be done to any such street, alley, avenue or public square by the laying down of any such pipes.

SEC. 2. That section three of the said act be and the same is hereby so amended as to read as follows, viz: The capital stock of said company shall be five hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation; it may be divided into such shares, subscribed for, paid and transferred in such proportions and manner as shall be prescribed by the by-laws and regulations of said company.

SEC. 3. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint. The board of directors shall consist of not less than three nor more than five stockholders, who shall be chosen by the stockholders at such time and in such manner as the said corporation shall by its by-laws prescribe, and shall hold their office until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors by death, resignation or otherwise; they may adopt such by-laws, rules and regulations for the government of said corporation and the
47 management of its affairs and business as they may think proper, not inconsistent with the laws of this State, and the fourth section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet.

SEC. 4. The said corporation is hereby authorized to borrow money and to mortgage or lease any of its property or franchises.

SEC. 5. This act shall be deemed a public act, and noticed as such by all courts without pleading, and take affect from and after its passage."

Approved February 7, 1865.

IV.

Your orator further shows that after the passage of said act, approved February 12, 1855, as amended by the act approved February 7, 1865, as herebefore set forth, your orator did act upon the privileges and powers therein granted, and did accept the same, and did construct and erect gas works in the city of Chicago, and did

with the consent of said city of Chicago, lay pipes for the distribution and delivery of gas to consumers thereof in said city of Chicago. That the consent of the city of Chicago was expressed in and by a certain ordinance passed and adopted by the common council of the city of Chicago on April 30, 1858, in the words and figures following, to wit:

An ordinance concerning the People's Gas Light and Coke Company. (Passed August 30, 1858.)

"*Be it ordained by the common council of the city of Chicago:*

SECTION 1. That permission and authority be, and the same are hereby granted to the People's Gas Light and Coke Com-
48 pany, of the city of Chicago, and State of Illinois, to lay their gas mains, pipes, feeders and service pipes in any of the streets, avenues, highways, public parks or squares throughout said city subject at all times, however, to the resolutions and ordinances of the common council of said city; *provided*, that said company when they shall open the ground to lay any pipe, or for any other purposes whatever, they shall restore the streets, pavements and sidewalks to a condition satisfactory to the city superintendent, with all convenient dispatch, and no more of any street or alley shall be opened or encumbered at any one time or in any one place, nor shall any street or alley be suffered to remain open or encumbered for a longer period than shall be strictly necessary to enable said company to proceed with their work; and said company shall be liable for all damages which may result from, or by reason of, opening or encumbering any street, alley or sidewalk in said city of Chicago, and *provided further*, that whenever said company shall desire to lay their pipe, or do other work in any of the principal streets of said city, before they commence doing so they shall consult the mayor or city superintendent of public works, and unless the mayor or superintendent consent to such work being done at the particular time, they shall not proceed with such work on any such principal street, without the express permission of the common council of the said city of Chicago; and *provided, further*, that nothing herein contained shall be construed to conflict with any rights or privileges heretofore given by the common council to the Chicago Gas Light and Coke Company, or in conflict with the provisions contained in the act of incorporation of the People's Gas Light and Coke Company, to first obtain the consent of the Chicago Gas Light and Coke Company, if pipes are laid previous to February 12, A. D. 1859."

V.

Your orator further shows that, in acting on the privileges and powers granted to and accepted by your orator in and by said charter, and in carrying out and performing the duties and obligations upon your orator imposed by said charter, your orator has
49 invested many millions of dollars in erecting and constructing gas works, plants and appliances, and in laying down pipes, mains, feeders and appurtenances, to enable your orator successfully to carry on the business of manufacturing and delivering

gas to consumers thereof throughout the city of Chicago, and thereby the said charter granted to the People's Gas Light and Coke Company, approved February 12, 1855, as amended by said act approved February 7, 1865, has become, and now is, a contract by and between your orator and the people of the State of Illinois; and your orator further shows that from and after the enactment of said act approved February 12, 1855, as amended by the act approved February 7, 1865, your orator did continuously, thence hitherto, remain in, and engage in, the business of manufacturing gas, and of selling and distributing said gas by means of mains, pipes, feeders and appliances laid in the streets of the said city of Chicago, and that your orator is now engaged in the business of manufacturing, selling and distributing gas in the city of Chicago, and that said contract by and between your orator and the people of the State of Illinois is a contract in full force and effect, and has not been repealed, annulled, cancelled, amended or otherwise prejudiced.

VI.

Your orator further shows that by said charter your orator is created a body politic and corporate, capable of contracting and being contracted with, and by said charter is granted full power and authority to erect and maintain the necessary works for the manufacture of gas within the said city of Chicago, and to manufacture, supply and sell gas to be made from any and all substances, or a combination thereof, from which illuminating gas is usually obtained, to be used for the purpose of lighting the city of Chicago and any streets, buildings, manufactories, public places or houses therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, and, with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any and all of the streets, alleys, avenues or public squares of said city, with full power to acquire, hold, occupy and enjoy all such real and personal estate as may be necessary and proper for the construction, extension and usefulness of the works of your orator, and for the management and good government of the same. That by virtue of said act of February 12, 1855, as amended by said act approved February 7, 1865, and the consent of the city of Chicago, as contained in said ordinance passed August 30, 1858, your orator was granted, with other powers, the power and authority to maintain and use and operate gas mains, pipes, feeders, service pipes and appliances and appurtenances in all of the streets, alleys, avenues, highways or public squares throughout the city of Chicago, at any time within the corporate limits of said city of Chicago, for the purpose of supplying gas to the residents thereof, consumers within said city of Chicago.

VII.

Your orator further shows that, relying upon the contract embraced in its charter, your orator has invested its capital and funds in the development of its business in the city of Chicago, and on the

date of the filing of this bill of complaint your orator owns real estate in the city of Chicago to the value of upwards of two millions of dollars; that it owns personal property in the city of Chicago to the value of upwards of ten millions of dollars; that it has many buildings, factories, retorts, plants and apparatus for the manufacture, sale and distribution of gas in the city of Chicago, and in all
51 parts and divisions thereof, and that it has upwards of seventeen hundred miles of pipes and mains laid in the streets, alleys and avenues, highways and public squares of said city, and that it is now engaged in the operation of the plants, pipes, mains and apparatus aforesaid, and in the distribution of gas through said pipes, mains, feeders and appliances to the city of Chicago, and to the citizens thereof, consumers of said gas.

VIII.

Your orator further shows that for some years prior to the passage of the amendment of February 7, 1865, of your orator's charter, hereinbefore set forth, and at the time of the passage of said amendment, and for several years thereafter, the rate charged by your orator for gas to consumers thereof in the city of Chicago, was the gross rate of $4.25, and the net rate of $3.75, per thousand cubic feet, and that by virtue of the said charter to your orator, and under which your orator has ever since been and is now conducting and carrying on its business and affairs, your orator was given full authority touching the management of its business and affairs, and full authority to fix such rates as your orator might deem reasonable, best or proper to charge for the gas sold and delivered by your orator to the consumers of said gas, customers of your orator, and that while in and by said act, approved February 7, 1865, it was provided that ten years after the passage of said act, the common council of the city of Chicago might by resolution or ordinance regulate the prices charged by your orator for gas, yet it was expressly provided in said act that the said common council of the city of Chicago should in no case be authorized to compel your orator to furnish gas at a less rate than $3 per thousand cubic feet.

And your orator charges that by said charter, and the ac-
52 ceptance thereof as aforesaid, by your orator, a contract was created between your orator and the people of the State of Illinois, by which it was provided and agreed, among other things, that the common council of the city of Chicago should never be authorized to regulate the rates charged by your orator for its gas so as to compel your orator to furnish gas at a less rate than $3 per thousand feet;

And your orator shows that pursuant to the powers and privileges granted by the terms of its charter, as hereinbefore set forth, your orator has from time to time fixed the rates charged by your orator for gas, sold by it in the city of Chicago, at such rates and prices as in the judgment of your orator it deemed proper to charge; and that your orator has from time to time decreased said rates, and that the price now and for some years last past charged by your orator for illuminating gas manufactured and sold by it in the city

of Chicago to the residents thereof and to the city of Chicago is the net rate of $1 per thousand cubic feet, and that the reductions from time to time made by your orator from the higher rates charged by your orator prior to and at the time of the passage of the said act of February 7, 1865, and for some years subsequent thereto, to the net rate of $1 per thousand cubic feet, have been made of your orator's own free will and voluntary act, and that said reduction in rates from time to time has not been by reason of any ordinance of the city of Chicago compelling or attempting to compel your orator to make any reduction or reductions in the price charged by your orator for the gas sold and delivered by it, in the city of Chicago, to the residents thereof and to the city of Chicago.

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IX.

And your orator here shows that the city of Chicago itself is a customer of your orator and has been for many years last past, and that its bills as a consumer of the gas manufactured and sold by your orator during the year 1899, and consumed by said city of Chicago, amounted to upwards of five hundred and fifty thousand dollars, and that the bills for gas manufactured, sold and delivered by your orator to the city of Chicago, and consumed by the city of Chicago, for the year 1900, amounted to upwards of four hundred and ninety thousand dollars, and that the city of Chicago is a customer of your orator in the same sense and in the same way and under the same legal conditions as each and every other customer of your orator in the city of Chicago; and your orator further shows that it has never delivered gas to the city of Chicago except upon annual contracts first made by and between your orator and the city of Chicago, and that it has never delivered gas to any customer or patron in the city of Chicago except upon contracts first made by and between such customer and your orator, and in each and every of such cases your orator has determined what the price should be for the gas to be furnished by your orator to such customer and to the city of Chicago, in accordance with the privileges and powers granted to your orator in its charter as aforesaid.

X.

Your orator further shows that by a statute of the State of Illinois it is provided, among other things, that all gas companies are authorized and empowered to sell, transfer and convey, or lease, their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease, and to hold and enjoy, said property.

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XI.

Your orator further shows that pursuant to the power and authority granted to and conferred upon gas companies doing business in the same city, town or village in the State of Illinois, by the act entitled, "An act in relation to gas companies, approved June 5th,

1897, in force July 1, 1897," and of the power granted to and conferred upon your orator in and by its charter, as aforesaid, the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, and the Chicago Economic Fuel Gas Company, in August, 1897, for a valuable consideration, transferred to your orator, and your orator then and there acquired and took over, all the gas mains, pipes, feeders, service pipes, connections and appurtenances, and all the manufacturing plants, buildings, machinery and property of the said named gas companies, and subsequently, and in January, 1898, the Mutual Fuel Gas Company and the Hyde Park Gas Company, transferred to your orator for a valuable consideration, and your orator then and there acquired and took over, all the gas mains, pipes, feeders, service pipes, connections and appurtenances, and all the manufacturing plants, buildings, machinery and property of the said Mutual Fuel Gas Company and of the Hyde Park Gas Company, and subsequently, and in November, 1898, the Calumet Gas Company transferred to your orator, for a valuable consideration, and your orator then and there acquired and took over, all the gas mains, pipes, feeders, service pipes, connections and appurtenances, and all the manufacturing plant, buildings, machinery and property of the said Calumet Gas Company.

And your orator states that all the property of the said several gas companies so transferred to and acquired and taken over by your orator was, at the time of such transfer and acquisition, severally situated within the corporate limits of the city of Chicago.

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XII.

Your orator further shows that said gas companies last named were severally corporations organized subsequent to 1870 under the general incorporation act of the State of Illinois, except the Chicago Gas Light and Coke Company and the Hyde Park Gas Company; that said gas companies severally were engaged in manufacturing and distributing gas in various sections of the city of Chicago; that the Consumers' Gas Company, the Equitable Gas Light and Fuel Company and the Chicago Economic Fuel Gas Company furnished gas only in a portion of the south division, so called, of the city of Chicago; that the Chicago Gas Light and Coke Company supplied gas in parts of the south and north divisions of the city of Chicago, and had laid some pipes and mains in the west division of the city of Chicago; that the Suburban Gas Company furnished gas in part of the territory formerly comprised within the town of Lake View; the Mutual Fuel Gas Company and the Hyde Park Gas Company severally supplied gas in a part of the territory formerly comprised in the town or village of Hyde Park, and the Calumet Gas Company in a certain other part of the territory formerly comprised in the town or village of Hyde Park. The Lake Gas Company furnished gas in a part of the territory formerly comprised within the corporate limits of the town of Lake. The Illinois Light, Heat and

Power Company did not distribute any gas to consumers, and your orator distributed gas chiefly in the west division of the city of Chicago, so called, although its pipes and mains extended
56 into the south division of the city of Chicago; that the plants, pipes, mains, feeders and appliances of all of said gas companies together were insufficient to supply all of the gas necessary to light the streets, alleys, highways, public squares and places of said city of Chicago and to supply all of the citizens of the city of Chicago who desired to be furnished with gas, and upon the acquisition by your orator of the plants and mains and pipes severally of said Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company, said companies severally ceased and desisted from manufacturing and supplying gas to consumers thereof, all of which consumers, however, and many thousand other consumers, in said city of Chicago, as quickly as connections, changes, and extensions of its enlarged system and property could be made by your orator, as hereinafter described, were and thence hitherto have been supplied and furnished with gas by your orator.

XIII.

Your orator further shows that the Chicago Gas Light and Coke Company is a body corporate, created by an act of the General Assembly of the State of Illinois, entitled "An act to incorporate the Chicago Gas Light and Coke Company," approved February 12, 1849, which act is in the words and figures following, that is to say:

57 An act to incorporate the Chicago Gas Light and Coke Company.

"*Be it enacted by the people of the State of Illinois, represented in the General Assembly:*

SEC. 1. That H. L. Stewart, W. S. Bennett, F. T. Sherman, P. L. Updike, P. Page, and their associates, be, and they are hereby created a body politic and corporate, with perpetual succession, by the name and style of 'The Chicago Gas Light and Coke Company,' and by that name they and their successors shall be capable in law of contracting and being contracted with, suing and being sued, defending and being defended, in all courts and places, and in all matters whatsoever with full powers to acquire, hold, occupy, and enjoy all such real and personal estate as may be necessary and proper for the construction, extension and usefulness of the works of said company, and for the management and good government of the same; and they may have a common seal, and the same may alter, break and renew at pleasure.

SEC. 2. The corporation hereby created shall have full power and authority to manufacture and sell gas, to be made from any or all of the substances, or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting

the city of Chicago, or the streets thereof, and any buildings, manufactories, public places or houses therein contained; and to erect all necessary works and apparatus, and to lay pipes for the purpose of conducting gas in any of the streets or avenues of said city. *Provided*, That no permanent injury or damage shall be done to any street, lane or highway in said city. The real estate which this corporation is entitled to hold shall not exceed in value fifty thousand dollars.

SEC. 3. The capital stock of said company shall not exceed three hundred thousand dollars, to be divided into shares of twenty-five dollars, to be subscribed for and paid in such proportion as shall be prescribed by the by-laws and rules for regulating the concerns of said company; as they shall think proper and necessary respecting the management and disposition of the stock, property and estate of said company; the duties of the officers, artificers and agents to be employed; the number and election of directors, and all such matters as appertain to the concerns of said company. Said com-
58 pany shall have the exclusive privilege of supplying the city of Chicago and its inhabitants with gas for the purpose of affording light for ten years."

Approved February 22, 1849.

Your orator further shows that said act approved February 12, 1849, was amended by an act of the General Assembly, approved January 17, 1855, in the words and figures following that is to say:

"An act to amend an act entitled 'An act to incorporate the Chicago Gas Light and Coke Company.'

SEC. 1. The Chicago Gas Light and Coke Company is hereby authorized to increase the capital stock of said company one million of dollars, at such times and in such manner as the board of directors shall from time to time direct.

Said company is also authorized to borrow such an amount of money for the purpose of constructing, carrying on and completing its works, upon such terms as the board of directors shall judge best, and for such purpose may issue its bonds and mortgage its property; and all bonds heretofore issued for such purpose, and all mortgages executed to secure the same by said company, are hereby legalized.

Said company shall also have the right to purchase and hold such amount in value and extent of real estate in the city of Chicago, as may be necessary for its business, and to carry out the objects of its incorporation.

SEC. 2. So much of the act to which this is an amendment as conflicts with this act, is hereby repealed.

This act shall take effect from and after its passage."

Approved Jan. 17, 1855.

That said Chicago Gas Light and Coke Company, subsequent to its organization under said acts aforesaid, purchased and acquired real estate, and erected gas works and laid down certain gas mains

and connections and began and continued to manufacture and distribute gas until it disposed of its plant and property to your orator, as hereinbefore set forth.

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XIV.

Your orator further shows that the Consumers' Gas Company is the successor of a corporation known as the Consumers' Gas, Fuel and Light Company, a corporation organized on or about January 25, 1882, for the manufacture, sale and distribution of gas for fuel and lighting purposes in the city of Chicago; that the common council of the city of Chicago, by an ordinance passed April 28, 1882, granted to said last-named company the right to construct, maintain and operate gas works within the city of Chicago, together with a right of way along, upon and under all the avenues, streets, alleys and public places in said city for the purpose of furnishing, operating, repairing and maintaining one or more lines or mains of gas pipes and all necessary feeders and service pipes in connection therewith, for lighting and fuel purposes, together with other privileges; which ordinance was accepted by said Consumers' Gas, Fuel and Light Company, and was in the words and figures following, to wit:

An ordinance granting rights to the Consumers' Gas, Fuel and Light Company to construct, maintain and operate gas works within the city of Chicago (passed April 28, 1882).

"*Be it ordained by the city council of the city of Chicago:*

SECTION 1. Subject to the terms and conditions of this ordinance there is hereby granted to the Consumers' Gas, Fuel and Light Company, of Chicago, the right to construct, maintain and operate gas works within the city of Chicago, together with the right of way along, upon and under all avenues, streets, alleys and public places in said city, for the purpose of placing operating, repairing and maintaining one or more lines of gas mains and pipes and all necessary feeders and service pipes in connection therewith, for lighting and fuel purposes.

SEC. 2. Such company or corporation shall not lay its main pipes in any such avenue, street, alley or public place of said city,
60 unless it shall at the said time lay down all feeders or service pipes necessary to make connection, without any subsequent disturbance of the pavement or surface of such avenue street or public place, with each and all building lots fronting or abutting thereon and all service pipes or feeders laid by said company shall be coated with Dr. Angus Smith's composition, or some other equally good material for preserving said service pipes or feeders from decay. Such company or corporation shall not charge any person desiring to make a connection with any service pipe laid, or to be laid by such company or corporation, more than twenty-five cents a foot for such service pipe when laid. Said company shall, when ordered by a majority of the city council, extend its main pipes in any block one-half of which shall be improved by buildings.

SEC. 3. That such company or corporation shall do no permanent injury to any street, sidewalk, alley, avenue or public place, or shade tree, or in any manner unnecessarily disturb or interfere with any water pipe, sewer or gas pipe, telegraph or electric wires, cables or pipes, now or hereafter laid by said city or any authorized company or corporation; and when such company or corporation shall open ground in the same, they shall forthwith restore the street, pavement, sidewalk or ground, or water pipe, sewer or gas pipe, to a condition equally good as before, at the expense of said company, and if said company shall fail or refuse so to do, the same may be done by said city, and the said company shall be liable for the cost thereof; and said company shall not make any excavations in any street, alley, avenue or public place, without first procuring a permit for that purpose from the department of public works of said city. When any excavation shall be made by said company in any street, alley or public place, paved with wooden blocks, the foundation boards or planks shall be removed without being cut, unless such cutting shall be especially permitted by the department of public works of said city. The said company shall not use the public fire-hydrants of said city, nor any water therefrom, without a license and permit from the department of public works of said city. The said company shall, upon notice from the department of public works of said city, remove or change any gas main, pipe, service pipe or feeder which may be in the way of or interfere with the construction or erection of any viaduct, public building or other public structure within said city.

61 SEC. 4. Such company or corporation shall not open or encumber more of any street, avenue, alley or public place, at any one time, than may be necessary to enable it to proceed with advantage in the laying of any such main pipe, feeder or service pipe, nor shall said company or corporation permit any such street avenue, alley or public place to remain open or encumbered for a longer period than shall be necessary to execute the work for which the same shall have been opened or without putting up the necessary barriers and lights, so as to effectually prevent the happening of any accident in consequence of such opening or encumbering of such street, alley avenue or public grounds.

SEC. 5. Such company or corporation shall be liable to and shall compensate the city of Chicago and pay any private individual, owner or owners, or parties interested in an property adjacent to any street, avenue, alley or public place, opened or injured by them, for all damages which may result from leaks of pipe, or by reason of such company or corporation having negligently opened, encumbered, protected or guarded any such street, avenue, alley or public place in said city.

SEC. 6. Such company or corporation shall be subject to all general ordinances of the city of Chicago in regard to gas companies. And the city of Chicago shall have the right, at any time, to provide for the appointment of one or more inspectors of gas with all the power and authority incident to such position, and which the said city may deem necessary to protect the city of Chicago in its corpo

rate rights and individual consumers of gas, against oppression or fraud; and, if the said city shall deem it necessary, to require any inspector (or other city official) to certify to the correctness of all gas bills of consumers of gas furnished by such company or corporation. All meters used by said company for measuring gas shall be subject to inspection and approval by such person or persons, officer or officers, as may be appointed by said city for that purpose, and said company shall pay all reasonable costs and charges of such inspection, the same to be fixed by the city council of said city.

SEC. 7. Such company or corporation shall supply gas light under uniform and sufficient pressure between sunset and sunrise of each day, and the quality of the same shall be as nearly uniform as practicable, averaging for any one month not less than sixteen sperm
62 candles burning 120 grains per hour, to be determined by authorized photometrical tests, a five-foot burner being used.

SEC. 8. The rights and privileges hereby granted are upon the express condition that no gas flowing through any main pipe, feeder or service pipe, laid by said company or corporation or by its authority, shall be charged for, to general consumers thereof, at a rate exceeding one dollar and seventy-five cents per thousand feet cubic: Provided, that to all consumers using at the rate of 100,000 cubic feet and over, per annum, a rebate of at least twenty-five cents per 1,000 feet shall be allowed, and to attempt to collect at a greater rate than that herein specified for gas consumed from any such main pipe, feeder or service pipe, shall work a forfeiture of the rights and privileges hereby granted. The rights and privileges granted are upon the further express condition that such company or corporation shall not extend its pipes beyond the limits of the city, or allow any connection to be made with its pipes, so that gas shall be furnished through its pipes to any consumer outside the city of Chicago.

SEC. 9. In the event that such company or corporation, within three years from the date of the passage of this ordinance giving it permission to lay its main pipes, etc., shall not have built and completed gas works in said city sufficiently extensive to enable it to manufacture and distribute gas to an amount not less than 10,000,000 feet in every thirty days, and located within the limits of the city of Chicago, and shall not have commenced such work and expended thereon at least five hundred thousand dollars within eight months from the date of the passage of this ordinance, or if such company or corporation shall at any time enter into any combination, directly or indirectly, with any gas company or companies, concerning the rates (or price) to be charged for gas, either to the city or private consumers, or if such company or corporations shall directly or indirectly sell, lease or transfer its franchises and privileges to any other gas company or corporation, or if such company or corporation, having commenced to manufacture gas, shall cease for a period of more than ten consecutive days (unless by reason of unavoidable accident) to furnish gas through their pipes, the rights and privileges hereby granted shall cease and be of no more force or effect; or shall fail or refuse to extend its main pipes, as required by section 2 of

this ordinance, and it shall not require the judgment or de-
63 cree of any court of law or equity to determine the said rights and privileges, but the same shall wholly cease and determine, absolutely and at once, upon the happening of any of the matters or things in this section specified.

SEC. 10. This ordinance shall not be in force as to said company or corporations until it shall have been accepted by such company or corporation, such acceptance to be made by the vote of such company or corporation, duly passed or recorded nor until such company or corporation shall have given and filed in the city clerk's office a good and sufficient bond, with two or more good and sufficient sureties, in the penal sum of $500,000, conditioned that such company or corporation shall and will, within three years from the date of the passage of this ordinance, build and complete gas works in said city, sufficiently extensive to enable it to manufacture and distribute gas to an amount not less than 10,000,000 feet in every thirty days, and located within the limits of the city of Chicago, and that the rate to be charged to the consumers of gas which may flow through the pipe laid by such company or corporation, or by its authority, shall never exceed the rate named and specified in section 8 of this ordinance, and that such company or corporation will not sell, lease or transfer its franchises and privileges to any other gas company, and shall and will not enter any combination with any other gas company concerning the rate (or price) to be charged for gas, and to pay all damages which the city of Chicago, or any consumer of the gas furnished by such company or corporation, shall suffer by reason of the failure of such company or corporation to perform any of the obligations or conditions of this ordinance, such bond and sureties to be approved by the mayor and city comptroller.

SEC. 11. The liability of said company to said city, or to person who may be injured by the exercise by said company of any rights and privileges hereby granted, shall not be limited by the penalty of said bond, nor shall the remedy against said company be confined to the said bond, it being understood that such remedy is merely cumulative, and that said city of Chicago and any person or persons, shall have the same remedies against said company as it or they would or might have if no such bond were given. In case the duties of the department of public works shall be devolved by said city on any other department or officer, the permits and licenses herein mentioned shall be applied for to such department or officer."

64 Your orator further shows that gas works were erected by said Consumers' Gas, Fuel and Light Company, and some mains laid, and said corporation proceeded to manufacture and supply gas, in a part of the city of Chicago, and so continued until the happening of certain events as hereinafter mentioned. That said company executed, sold and delivered an issue of bonds secured by a mortgage or deed of trust upon its property and franchises, which bonds and mortgages were subsequently foreclosed, and on or about November 21, 1886, the Consumers' Gas Company was organ-

ized for the purpose of manufacturing and selling fuel and illuminating gas in the city of Chicago, and by purchase acquired at the foreclosure sale under the mortgage or deed of trust executed and delivered by said Consumers' Gas, Fuel and Light Company, all and singular the plant, property, assets and franchises of said last-named corporation, and thereafter, and until its property was acquired and taken over by your orator in August, 1897, as aforesaid, said Consumers' Gas Company operated said plant and manufactured, sold and distributed gas in a part of the city of Chicago.

XV.

Your orator further shows that on or about August 3, 1885, the Equitable Gas Light and Fuel Company of Chicago was incorporated for the purpose of making gas of any and all kinds, and of using, supplying, furnishing or otherwise disposing of the same to the city of Chicago and its vicinity. By virtue of an ordinance adopted by the common council of the city of Chicago, August 10, 1885, there was granted to said Equitable Company the right to construct, maintain and operate gas works within the city of Chicago, together with a right of way along, upon and under all the avenues, streets, alleys and public places of said city, for the purpose of furnishing, operating, repairing and maintaining one or more lines of gas mains and pipes, and all necessary feeders and service pipes in connection therewith, for lighting and fuel purposes; that under its charter powers and the privileges granted by said ordinance, the Equitable Gas Light and Fuel Company erected and maintained a gas plant for the manufacture of gas, and did lay down, operate and maintain some gas mains and connections, and did manufacture and sell gas in a part of the city of Chicago, until said Equitable Gas Light and Fuel Company disposed of its property and plant to your orator, as hereinbefore set forth; that the ordinance granted by the city of Chicago to the Equitable Gas Light and Fuel Company was in the words and figures following, that is to say:

An ordinance granting rights to the Equitable Gas Light and Fuel Company to construct, maintain, and operate gas works (passed August 10, 1885).

"*Be it ordained by the city council of the city of Chicago:*

SEC. 1. Subject to the terms and conditions of this ordinance, there is hereby granted to the Equitable Gas Light and Fuel Company of Chicago, its successors and assigns, the right to construct, maintain and operate gas works within the city of Chicago, together with the right of way along, upon and under all the avenues, streets, alleys and public places in said city, for the purpose of placing, operating, repairing and maintaining one or more lines of gas mains and pipes and all necessary feeders and service pipes in connection therewith for lighting and fuel purposes.

SEC. 2. Such company or corporation shall not lay its main pipes n any such avenue, street, alley or public place of said city, unless shall at the time lay down all feeders or service pipes necessary to

make connections without any subsequent disturbance of the pavement or surface of such avenue, street or public place with each and all building lots fronting or abutting thereon, and all service pipes or feeders laid by said company shall be coated with Dr. Angus Smith's composition, or some other equally good material, for preserving said service pipes or feeders from decay. Such company or corporation shall not charge any person desiring to make a connection with any service pipe, laid or to be laid by such company or corporation, more than twenty-five cents a foot for such service pipe when laid. Said company shall, when so ordered by a two-thirds vote of all the alderman elected, extend their main pipes in any block three-quarters of which shall be improved by buildings.

66

SEC. 3. Such company or corporation shall do no permanent injury to any street, sidewalk, alley, avenue or public place, or shade tree, or in any manner unnecessarily disturb or interfere with any water pipe, sewer or gas pipe now or hereafter laid by said city or any authorized company or corporation, and when such company shall open ground in the same it shall forthwith restore the street pavement, sidewalk, or ground, or water pipe, sewer or gas pipe, to a condition equally as good as before, at the expense of said company, and if said company shall fail or refuse so to do, the same may be done by said city, and the said company shall be liable for the cost thereof; and said company shall not make any excavation in any street, alley, avenue or public place without first procuring a permit for that purpose from the department of public works of said city. When any excavations shall be made by said company in any street, alley or public place paved with wooden blocks, the foundation boards or planks shall be removed without being cut unless such cutting shall be specially permitted by the department of public works of said city. The said company shall not use the public fire-hydrants of said city nor any water therefrom, without a license or permit from the department of public works of said city. The said company shall, upon notice from the department of public works of said city, remove or change any gas-main pipe, service pipe, or feeder, which may be in the way of, or interfere with, the construction or erection of any viaduct, public building or other public structure within said city.

SEC. 4. Said company or corporation shall not open or encumber more of any street, avenue, alley or public place, at any one time, than may be necessary to enable it to proceed with advantage in the laying of any such main pipes, feeders or service pipe, nor shall said company permit any such street, avenue, alley or public place to remain open or incumbered for a longer period than shall be necessary to execute the work for which the same shall have been opened, or without putting up the necessary barriers and lights, so as to effectually prevent the happening of any accident, in consequence of such opening or encumbering of such street, alley, avenue or public grounds.

SEC. 5. Such company or corporation shall be liable to, and
67 shall compensate the city of Chicago, and pay any private individual, owner or owners, or parties interested in any property adjacent to any street, avenue, alley or public place opened or injured by it, for all damages which may result from leaks of pipe, or by reason of such company having neglectfully opened, incumbered, protected or guarded any such street, avenue, alley or public place in said city.

SEC. 6. Such company or corporation shall be subject to all general ordinances of the city of Chicago in regard to gas companies. And the city of Chicago shall have the right, at any time, to provide for the appointment of one or more inspectors of gas, with all the power and authority incident to such position, and which the said city may deem necessary, to protect the city of Chicago, in its corporate rights, and individual consumers of gas against oppression or fraud; and, if the said city shall deem it necessary to require any inspector (or other city official) to certify to the correctness of all gas bills of consumers of gas furnished by such company. All meters used by said company for measuring gas shall be subject to inspection and approval by such person or persons, officer or officers, as may be appointed by said city for that purpose, and said company shall pay all reasonable costs and charges of such inspection, the same to be fixed by the city council of said city.

SEC. 7. Such company or corporation shall supply gaslight under uniform and sufficient pressure between sunset and sunrise of each day, and the quality of the same shall be as nearly uniform as practicable, averaging for any one month not less than sixteen sperm candles, burning 120 grains per hour, to be determined by authorized photometrical tests, a five-foot burner being used.

SEC. 8. The rights and privileges hereby granted are upon the express condition that no gas flowing through any main pipe, feeder or service pipe, made by said company or by its authority, shall be charged for, to general consumers thereof, at the rate exceeding $1.75 per thousand cubic feet; *provided*, to all customers using 100,000 cubic feet and over per annum, a rebate of at least 25 cents per thousand feet shall be allowed, and to attempt to collect at a greater rate than that herein specified for gas consumed from any such main pipe, feeder or service pipe, shall work a forfeiture of the rights and privileges hereby granted.

SEC. 9. In the event that such company or corporation
68 within three years from the date of the passage of this ordinance, giving it permission to lay its main pipes, etc., shall not have built and completed gas works in said city sufficiently extensive to enable it to manufacture and distribute gas to an amount not less than 10,000,000 feet in every thirty days and located within the limits of the city of Chicago, and shall not have commenced such works and expended thereon at least $100,000 within twelve months from the date of the passage of this ordinance, or if such company shall at any time enter into any combination, directly or indirectly, with any gas company or companies, concerning the rates (or price) to be charged for gas either to the city or private con-

sumers, or if such company shall, directly or indirectly sell, lease or transfer its rights and privileges hereunder to any gas company or corporation now engaged in the manufacture and sale of gas within the city of Chicago, or commence to manufacture gas, shall cease for a period of more than ten consecutive days (unless by reason of unavoidable accident), to furnish gas through its pipes, the rights and privileges hereby granted shall cease and be of no more force or effect or shall fail or refuse to extend their main pipe as required by section 2 of this ordinance; and it shall not require the judgment or decree of any court of law or equity to determine the said rights and privileges, but the same shall wholly cease and determine, absolutely and at once upon the happening of any of the matters or things in this section specified.

SEC. 10. This ordinance shall not be in force as to said company or corporation until it shall have been accepted by such company or corporation, such acceptance to be made by a vote of such company or corporation and notice thereof in writing filed with the city clerk, nor until such company shall have given and filed in the city clerk's office a good and sufficient bond, with two or more good and sufficient sureties, in the penal sum of $100,000, conditioned that such company shall and will, within three years from the date of the passage of this ordinance, build and complete gas works in said city sufficiently extensive to enable it to manufacture and distribute gas to an amount not less than 10,000,000 feet in every thirty days, and located within the limits of the city of Chicago, and that the rate to be charged to the consumers of gas which may flow through the pipes laid by such company, or by its authority shall never exceed the rate named and specified in section 8 of
69 this ordinance, and that such company will not sell, lease or transfer its franchises and privileges to any gas company now engaged in the manufacture and sale of gas within the city of Chicago, and shall and will not enter any combination with any other gas company concerning the rate (or price) to be charged for gas, and to pay all damages which the city of Chicago, or any consumer of the gas furnished by such company, shall suffer by reason of the failure of such company to perform any of the obligations or conditions of this ordinance; such bond and sureties to be approved by the mayor and city comptroller.

SEC. 11. The liability of such company or corporation to said city or to any person who may be injured by the exercise by said company of any of the rights and privileges hereby granted, shall not be limited by the penalty of said bond, nor shall the remedy against said company be confined to the said bond, it being understood that such remedy is merely cumulative and that said city of Chicago, and any person or persons, shall have the same remedies against said company as it or they would or might have if no such bond were given. In case the duties of the department of public works shall be devolved by said city on any other department or officer the permits and license herein mentioned shall be applied for to such department or officer.

This ordinance shall take effect and be in force from and after its passage."

XVI.

Your orator further shows that on the 18th day of November, 1885, the Illinois Light, Heat and Power Company was incorporated for the purpose of making, distributing, selling or otherwise disposing of gases of any and every description, for any and all purposes for which the same should or might be or become useful, adaptable or available. That said Illinois Light, Heat and Power Company never procured any rights or privileges from the city of Chicago to lay pipes or mains in the streets, and said company laid no mains, pipes or feeders in the streets of the city of Chicago, but shortly after its incorporation, and upon the erection and
70 construction of its gas-making plant, leased the same to your orator; and that there was thereafter manufactured in said plant a part of the gas sold and distributed by your orator through the mains, pipes, feeders and appliances of your orator.

XVII.

Your orator further shows that on or about July 5, 1881, the Lake Gas Company was incorporated for the purpose of manufacturing and supplying gas in the town of Lake; that said company, as successor or assignee of the Northwestern Gas Works Company, was, by the town of Lake, by ordinance adopted July 5, 1881, authorized to lay down, maintain and operate gas mains, pipes, feeders and appliances in all the streets of the town of Lake; that thereafter said Lake Gas Company erected works and laid some pipes and mains in the streets of said town, and engaged in the business of manufacturing and selling gas in a part of said town of Lake, and so continued until said Lake Gas Company disposed of its plant and property to your orator as aforesaid. That in the year 1889 the town of Lake by annexation became a part of the city of Chicago, and the territory formerly comprised in said town of Lake has since remained within the corporate limits of said city of Chicago.

That the ordinance granted by the town of Lake to the Northwestern Gas Works Company, and so assigned to said Lake Gas Company, was and is in the words and figures following, to wit:

An ordinance granting rights to the North Western Gas Works Company in certain territory (passed July 5, 1881).

"*Be it ordained and enacted by the board of trustees of the town of Lake, and it is hereby enacted by authority of the same:*

SEC. 1. That exclusive and irrevocable privilege and authority is hereby granted to the said North Western Gas Works Com-
71 pany, a corporation, existing by virtue of the laws of New York its assigns and representatives, to furnish illuminating gas for the period of twenty-five years, and to open such streets, alleys, highways and public grounds in the said town of Lake as may be necessary to enable said gas works company to lay down, operate, maintain and extend its street mains and service pipes.

The privileges and authority hereby granted are upon the following express conditions:

First. That the said gas works company, its successors and assigns, shall and will forever indemnify and save harmless the said town of Lake against all and from any and all damages, judgments, decrees, costs and expenses of the same which it may suffer, or which may be recovered or obtained against said town of Lake, for or by reason of the granting of such privileges and authority, or for or by reason of, or growing out of, or resulting from the passage of this ordinance, or any other matter or thing connected therewith, or with the exercise by said company its grantees or assigns under, or by virtue of the provisions of this ordinance.

Second. That the said gas company, its successors and assigns, shall place all such streets, avenues, highways and public grounds in as good condition as they were before said work was begun.

Third. That the main supply-pipes of said gas company shall be laid on a line parallel to and ten (10) feet west of the center line of all streets running north and south, and on a line parallel to and ten (10) feet south of the center line of all streets running east and west, unless otherwise ordered by the board of trustees and in such a manner as not to interfere with any improvements said board may deem proper to make upon such streets, alleys, avenues, highways and public grounds, or have made heretofore.

SEC. 2. That for and in consideration of the foregoing exclusive privilege and authority, it shall be obligatory upon such gas works company, its successors, representatives and assigns to construct in said town of Lake suitable buildings, erections and fixtures for the manufacture of gas for consumption and use in said town, at such place in said town as said company may desire, *provided*, such place is acceptable to said board of trustees, and to lay mains along such streets, alleys, avenues, highways and public grounds as the exigencies of business and private demands of the inhabitants of
72 said town may require, and where the consumption of gas will justify the laying of mains and service pipes; and to furnish and supply gas to such public lamps along the line of such main pipes as may be laid, as specially provided by this ordinance, and shall also be ordered from time to time by the board of trustees of said town; such public lamps to have burners which will furnish an equivalent in illuminating value to that produced by a burner consuming four (4) cubic feet of good coal gas per hour, including the lighting, extinguishing, cleansing and repairing of said street and public lamps, the price therefor to be paid by said town, thirty-two $\frac{50}{100}$ dollars per lamp per annum, and when the number of lamps shall reach two hundred and fifty, then at the price of thirty dollars per lamp per annum, and when the number of lamps shall reach five hundred or upwards, then at the price of twenty-seven $\frac{50}{100}$ dollars per lamp per annum for the first ten years of the life of this ordinance, and for the balance of the term or life of this ordinance at such a price as may be mutually agreed upon, not to be less than twenty ($20) dollars per lamp per annum, to be paid monthly in all cases except as to the first year hereof, and for gas consumed and

services in connection with said lamps for such first year payment shall be made by a warrant upon the treasurer of said town, to be paid out of a fund collected by special assessments or property deemed benefited, to be levied during the year 1881, and if the same cannot, for any reason, be so paid, then out of the general fund of said town.

SEC. 3. That said lamps are to be lighted and extinguished in accordance with what is known as the Philadelphia scale or standard of time.

SEC. 4. That the style of the first one hundred twenty-five (125) lamps to be used shall be what is known as the Stewart improvement, and the style of the lamp-post to be used shall be like that now used in the city of Chicago.

SEC. 5. That said town of Lake shall pay for putting in all pipes, posts and fixtures for its own use and benefit from the main pipes, where the connection is made; said pipe and fixtures to be put in under the supervision of said company or their representatives.

SEC. 6. That said company shall furnish gas to citizens, residents and manufacturers of said town, for their private consumption, at a price not to exceed two (2) dollars and fifty (50) cents for the
73 equivalent in illuminating power or value of one thousand (1,000) cubic feet of good coal gas of fourteen (14) candle-power, said citizens, residents or manufacturers to pay for putting in the necessary pipes and fixtures to connect the point of consumption with the main pipes—such connection to be put in under the supervision of said gas works company, or their representatives.

SEC. 7. That the said town of Lake further agrees that the right to light its streets, highways, public grounds or buildings shall not be granted to any other corporation, corporations, person or persons whatsoever during the term of this ordinance, and to purchase from said company, or its representatives, so much gas as may be required to properly illuminate such principal streets and public grounds of said town during the term of this ordinance as its board of trustees may from time to time order to be supplied with gas and lighted as aforesaid.

SEC. 8. Said gas works company to commence works within thirty (30) days from the acceptance of this ordinance, and carry the same steadily forward until the mains are laid in the following-named streets, to wit: Halsted street, from Thirty-ninth street to Forty-third street; in Forty-third street, from Halsted street to Wentworth avenue; in Wentworth avenue, from Thirty-ninth street to Sixty-seventh street; in Forty-seventh street, from Wentworth avenue to State street; in Fifty-first street, from School street to the tracks of the Chicago, Rock Island and Pacific Railroad Company; in Thirty-ninth street, from Wentworth avenue to State street, and in State street, from Thirty-ninth to Fortieth street. The laying of said pipes in said streets to be completed during the year eighteen hundred and eighty-one (1881), unavoidable delays excepted, and in case such delays occur, to be completed as soon thereafter as practicable, due diligence to be exercised in the prosecution of the work by said gas works company.

SEC. 9. That at least one hundred and twenty-five public lamps shall be erected on the line of said main pipes as soon as said gas works company are prepared to furnish gas for the same. That said gas works company, by acceptance of this ordinance, agree to furnish said one hundred and twenty-five (125) lamp-posts, lanterns of the style above mentioned in the ordinance, together with lamp-posts, cocks and burners of the style and pattern generally used in the principal cities of the country, at sixteen (16) dollars and forty (40) cents each; and for service pipes, excavations and labor
74 necessary to put the same in order for lighting, three (3) dollars and sixty (60) cents each additional for each lamp-post.

SEC. 10. That the one hundred and twenty-five (125) lamps, lamp-posts, burners and cocks above mentioned shall be paid for by warrant drawn on the treasurer of said town, to be paid out of a fund, when collected, to be collected by special assessment on the property deemed benefited by the erection of said lamps and lamp-posts, to be levied during the year eighteen hundred and eighty-one (1881).

SEC. 11. That in case the board of trustees shall deem it necessary to light the streets in isolated localities, where the consumption of gas will not warrant the laying of pipes, said company shall light the same with oil or gasoline lamps, at a price to be mutually agreed upon by said board of trustees and said company, at a price as low as any responsible parties will agree to light the same.

SEC. 12. This ordinance shall take effect and be in force from and after its passage and acceptance, and to be void unless the said gas works company shall file its written acceptance of the same with the town clerk of said town of Lake within twenty (20) days after its passage."

XVIII.

Your orator further shows that on or about November 5, 1884, there was organized the Suburban Gas Company, for the purpose of manufacturing or obtaining gas made from coal or other substances and materials, and the distribution and sale of the same; that said Suburban Gas Company did not manufacture gas, but confined its operations to selling gas in a part of the town of Lake View, Cook county, Illinois, and by an ordinance of said town was authorized to supply and sell gas within the town of Lake View, and lay down mains and connections for the purpose of distributing gas. That subsequent to the incorporation of said company and the passage of said ordinance, said Suburban Gas Company laid some gas
75 mains and sold gas in a part of said town of Lake View, until said company disposed of its property to your orator as hereinbefore set forth; that the ordinance of the town of Lake View granted to said Suburban Gas Company was and is in the words and figures following, to wit:

An ordinance granting rights to the Suburban Gas Company in the town of Lake View (passed and approved October 29, 1884; accepted November 17, 1884).

"*Be it ordained by the board of trustees of the town of Lake View:*

SECTION 1. That permission and authority be and the same are hereby granted to the Suburban Gas Company to supply and sell gas made from coal or other substances, to be used for heating and illuminating purposes, within the town of Lake View, and to lay and maintain gas mains and service pipes for distributing said gas in any of the public streets, alleys, avenues, highways or grounds within the limits of said town.

SEC. 2. That before said company shall open any street, alley, highway or other public place for the purpose of introducing its mains or service pipes, it shall cause notice of its intention so to do, to be given to the corporate authorities of said town, specifying in such notice the streets or parts of street, alley or other public place in which it is proposed to introduce such pipes.

SEC. 3. In all cases where said company shall open any street, alley or other public place within said town, for the purpose of laying its pipes therein, it shall restore the same to its former condition as nearly as practicable with as little delay as possible; and no more of any street, alley or other public place shall be disturbed or incumbered in the laying of said pipe, nor shall the same remain open or incumbered for a longer time than shall be necessary to enable said company to complete its work as above provided. And said company shall be liable for any and all damages resulting from its negligent conduct in the prosecution of said work, and from its failure or neglect to properly guard and protect the excavations made by it in the progress thereof.

SEC. 4. That whenever said company shall desire to open any improved street it shall first procure a permit from said town so
76 to do, and when any such improved street shall have been opened, said company shall restore the improvement to as good a condition as the same was before such opening, and upon its neglect or refusal to restore the same in such condition, then said town may properly restore the same and said company shall be liable to the town for any costs incurred thereby.

SEC. 5. That whenever said town shall by ordinance order the permanent improvement of any street, it may by further order direct said company to lay in such street its necessary pipes and house connections to all buildings along the line of such improvements.

SEC. 6. The said company shall furnish gas for consumption within said town of an illuminating power of not less than sixteen (16) candles, and to the corporate authorities of said town, for the lighting of the street, public buildings and public places within said town at a price not exceeding one dollar and fifty cents ($1.50) per thousand cubic feet to be measured by automatic regulator burners attached to the lamps, or otherwise as may be agreed between said company and the corporate authorities of said town; and the price

of gas to private consumers within said town shall not exceed two dollars ($2.00) per thousand cubic feet with a discount therefrom of fifty cents (50c.) per thousand cubic feet in case the bills therefor for each month shall be paid within the first ten (10) days of the next succeeding month. And that the town of Lake View shall cause street lamps to be erected a suitable distance along the public street in which the gas mains of said company shall be laid, to be connected with said mains, and shall immediately and for the period of five years thereafter, at all proper hours of the night, take and consume the gas of the said company for the lighting of said streets, and pay for the gas so consumed at and after the price and rate aforesaid. Settlements and payments to be made quarter-yearly. The schedule for the time for lighting and extinguishing said street lamps, and the size of burners thereon, to be the same in use in the north division of the city of Chicago.

SEC. 7. That said company shall within six (6) months of the date of the passage of this ordinance lay in the street- or alleys of said town of Lake View, at least three (3) miles of street mains with proper service pipes connected therewith, for the supplying of gas to actual consumers, and shall within two years extend its
77 mains to Ravenswood, and shall thereafter extend said mains and service pipes as rapidly as the increased demand for gas shall justify such extension.

SEC. 8. Unless the said 'Suburban Gas Company' shall within ten (10) days from and after the passage of this ordinance accept the same and the terms and provision- thereof, and notify the board of trustees of the town of Lake View of such acceptance, all the rights and privileges hereby granted to said company, shall be absolutely forfeited."

XIX.

Your orator further shows that on or about December 9, 1889, there was organized the Chicago Economic Fuel Gas Company, for the purpose of manufacturing and selling fuel or heating gas, and also illuminating gas, and the construction and operation of gas works or plants in the city of Chicago, and to distribute and sell said illuminating gas by means of pipes in the city of Chicago and the various cities and towns in the State of Illinois and throughout the United States, and for such purpose to construct or purchase from others the necessary works, machinery, plants and devices for the manufacture and distribution of illuminating gas in said city; that said company, by ordinance dated December 22, 1890, was given the right and privilege to construct and operate works for the manufacture of fuel gas only within the limits of the city of Chicago, and to place and maintain pipes and mains along the streets and public places of said city. That said ordinance was amended July 13, 1891, by adding the right to manufacture illuminating gas as well as fuel gas; that both of said ordinances were accepted and mains laid and fuel gas furnished by said company in a part of said city of Chicago until said company disposed of its property and plant to your orator, as hereinbefore set forth; that the original

ordinance granted by the city council of the city of Chicago to said Chicago Economic Fuel Gas Company was and is in the words and figures following, to wit:

78 An ordinance granting authority to the Chicago Economic Fuel Gas Company to construct and operate works for the manufacture of fuel gas in the city of Chicago (passed December 22, 1890; accepted January 19, 1891).

"*Be it ordained by the city council of the city of Chicago:*

SECTION 1. Subject to the terms and conditions of this ordinance, there is hereby granted to the Chicago Economic Fuel Gas Company, its successors and assigns, the right to construct and operate works for the manufacture of fuel gas, only, within the city of Chicago, also with the right of way along, upon and under all the avenues, streets, alleys and public places in said city for the purpose of placing, operating, repairing and maintaining a line or lines of gas mains and pipes and all necessary feeders and service pipes in connection therewith, for the distribution of natural and manufactured fuel gas exclusively. Said gases shall, at all times, be of the best quality and highest efficiency respectively for the purposes. *Provided, however*, That the successors and assigns referred to in this section, or elsewhere in this ordinance, shall not be construed to include any other gas company, trust or corporation, as provided in section twelve (12) of this ordinance.

SEC. 2. Such company or corporation shall not lay its main pipes in any such avenue, street, alley or public place of said city, unless it shall at the time lay down all feeders or service pipes necessary to make connection without any subsequent disturbance of the pavement or surface of such avenue, street or public place with each and all building lots fronting or abutting thereon, and all service pipes or feeders laid by said company shall be coated with Dr. Angus Smith's composition, or *or* some other equally good material for preserving said service pipes or feeders from decay. *Provided*, That the main or distributing pipes shall be laid on such portion of the public highway as the commissioner of public works may direct, and at all intersecting streets which are improved the main or distributing pipes shall be laid at right angles thereto and extend at least to the building line, and all feeders or service pipes shall be laid to the curb line of the street. Said company or corporation shall not charge any person desiring to make a connection with any
79 service pipe laid or to be laid by such company or corporation more than 25 cents a lineal foot for such service pipe when laid. Said company shall, when so ordered by a majority vote of all the aldermen elected, extend their mains and supply pipes on any street, avenue or other public highway contiguous to the pipes of said company at the time in use or operation. *Provided*, Such extension shall cover territory one-half of which is improved by buildings.

SEC. 3. That said company or corporation shall do no permanent injury to any street, sidewalk, alleys, avenue or public place, or shade tree, or in any manner unnecessarily disturb or interfere with

any water pipe, sewer, gas pipe, conduit or other underground work now or hereafter laid by said city, or any authorized company or corporation, and when such company shall open ground in any street it shall forthwith restore the street, pavement, sidewalk or ground or water pipe, sewer, gas pipe, conduit or other underground work, to a condition equally as good as before, at the expense of said company, and, if said company shall fail or refuse so to do, the same may be done by said city and the said company shall be liable for and pay the cost thereof. Said company shall not make any excavation in any street, avenue, alley or public place without first procuring a permit for that purpose from the commissioner of public works of said city. When any excavation shall be made by said company in any street, alley or public place paved with wooden blocks, the foundation boards or planks shall be removed without being cut, unless said cutting shall be specially permitted by the commissioner of public works of such city. The said company shall not use the public fire-hydrants of said city or any water therefrom, without paying for same, under a license and permit from the commissioner of public works of said city. The said company shall, upon notice from the commissioner of public works of said city remove or change any gas main pipe, service pipe or feeder which may be in the way or interfere with the construction or erection of any viaducts, public building or other public structure, and whenever said city shall construct or form into a general subway any street, avenue, alley or other public highway, on or through which any pipe or pipes authorized by this ordinance may be located, said company, upon due notice from proper city authorities, shall occupy said subway and place and maintain its pipes and appurtenances therein at its own cost and expense.

80 SEC. 4. Such company or corporation shall not open or encumber more of any street, avenue, alley or public place at any one time than may be necessary to enable it to proceed with advantage in the laying of such main pipes, feeder or service pipes, nor shall said company permit any such street, avenue, alley or public place to remain open or encumbered for a longer period than shall be necessary to execute the work for which the same shall have been opened, or without putting up the necessary barriers and lights so as to effectually prevent the happening of any accident in consequence of such opening or encumbering of such street, alley, avenue or public grounds, nor shall any two next parallel streets be excavated at the same time.

SEC. 5. Such company or corporations shall be liable to and shall compensate the city of Chicago, and pay any private individual, owner or owners, or parties interested in any property adjacent to any street, avenue, alley or public place opened or injured by it, for all damages which may result from leaks of pipes, or by reason of such company having neglectfully opened, encumbered, protected or guarded any such street, avenue, alley or public place in said city: *Provided*, said company shall, in the exercise of the rights and privileges hereby granted, be subject to all laws and ordinances relating to nuisances.

SEC. 6. Such company or corporation shall be subject to all general ordinances of the city of Chicago in regard to gas companies, and the city of Chicago shall have the right at any time to provide for the appointment of one or more inspectors of gas, with all the power and authority incident to such position and which the said city may deem necessary to protect the city of Chicago in its corporate rights and individual consumers of gas. All meters used by said company for measuring gas shall be subject to inspection and approval by such person or persons, officer or officers, as may be appointed by said city for that purpose, and said company shall pay all reasonable cost and charges of such inspection as the same may be fixed by the city council of said city, and said company shall pay the reasonable cost of all necessary city inspectors of the work of construction.

SEC. 7. The rights and privileges hereby granted are upon the express condition that no gas flowing through any main pipe, feeder or service pipe laid, controlled or operated by said company or by its authority, shall be charged for at a rate not to exceed sixty
81 (60) cents per one thousand (1,000) cubic feet for natural gas, nor to exceed fifty (50) cents per one thousand (1,000) cubic feet for manufactured fuel gas, with a rebate of ten (10) cents per thousand (1,000) cubic feet on said above prices in case of payment before the 12th day of the month next succeeding that in which such gas is furnished, and to attempt to collect a greater rate than that herein specified shall work a forfeiture of the rights and privileges hereby granted.

SEC. 8. The laying of the pipes herein authorized shall be under the supervision and direction of the commissioner of public works, and where said company shall apply to the commissioner of public works for permission to lay its pipes on any given street in order to reach any specified point on such street, and there shall be an alley parallel with said street and within three hundred feet of the same, the commissioner of public works shall order such pipe or pipes to be laid in such alley instead of such street, and the use of such alley shall be subject to all the conditions provided herein for streets.

SEC. 9. Said company shall pay annually to the city of Chicago, for and in consideration of the rights and privileges hereby granted, an amount equal to five (5) per cent. of the gross revenue or receipts of said company. Such payment shall be made in the manner following: At the expiration of one year from the time when said company shall commence to distribute gas to consumers in the city of Chicago the president or other chief officer of the company shall file with the city comptroller a statement verified under oath, showing the amount of the gross annual revenue or receipts of said company for the preceding year and shall, at the same time, pay to said comptroller the said amount of five (5) per cent. on the annual gross revenue receipts. Said payment to be made, as herein prescribed, annually during the term of this ordinance.

SEC. 10. This ordinance is granted upon the express condition that said company shall, within two years from the date of the acceptance of this ordinance, have laid, and in operation and ready

for supplying consumers, at least twelve (12) miles of its main pipes within the limits of the city of Chicago, and unless it shall so have constructed and laid the number of miles of distribution pipes herein referred to, then and under these conditions this ordinance shall be and become void and of no effect: *Provided*, however, that the time during which any legal proceedings shall be pend-
82 ing, whereby the said company, its successors and assigns, shall be prevented from or delayed in complying with the requirements of the section, shall not be taken or deemed any part of the time specified. *Provided, further*, however, that the city of Chicago may intervene in any suit and move for its dismissal, in the name of said company, in case such suit may be deemed by the city as collusive or for the purposes of delay or extension of the time herein specified.

SEC. 11. Said company shall file with the city clerk a good and sufficient bond to be approved by the mayor in the penal sum of one hundred thousand dollars ($100,000), conditioned that such company, its successors or assigns, shall comply with all the terms and conditions of this ordinance and shall indemnify and save harmless the city of Chicago against and from any and all damages, judgments, decress and costs of whatsoever kind or nature, by reason of the passage of this ordinance and the exercise of any of the rights and privileges hereby or herein granted.

SEC. 12. This ordinance shall take effect and be in force from and after its passage and the filing and approval of the bond herein required and the acceptance thereof by said company: *Provided*, That if said approved bond and acceptance be not filed within thirty days of the passage hereof, this ordinance, shall be void and of no effect; and, *provided* still further, that if said company shall at any time enter into any combination directly or indirectly, w-th any gas company or companies, concerning the rates or prices to be charged for gas, or is said company shall, directly or indirectly, sell, lease or transfer its plant, property rights and privileges as herein authorized to any other gas company, trust or corporation now or hereafter engaged in the manufacture and sale — gas within the city of Chicago, or if said company, having commenced to manufacture gas, or furnish natural gas shall cease for a perion of more than ten (10) consecutive days, unless by reason of unavoidable accident, or injunction to furnish gas through their pipes, or if said company shall fail or refuse to extend its distribution pipes, as required by this ordinance the rights and privileges hereby granted shall cease and be of no more force and effect.

SEC. 13. The rights and privileges granted by this ordinance shall be granted for the terms of twenty-five (25) years from and after its acceptance, and all rights hereunder shall cease
83 after the expiration of such term. The permission and authority hereby granted are upon the express terms and conditions that at the end of twenty (20) years after the passage of this ordinance the city of Chicago shall have the right to purchase the entire plant of said company and all of its property and effects, of every kind and description, within said city of Chicago, at an ap-

praised value which shall be ascertained and determined by three competent appraisers, who shall have free access to all the books, papers and other data bearing upon the subject. Said appraised value shall not include the value of any rights, privileges and franchises granted by the city. One of said appraisers shall be appointed by the mayor or the city of Chicago, one by said company, and one by the two so selected, and if they cannot agree upon the third appraiser, then any one of the chancellors of the circuit court of Cook county may appoint him. The said appraisers shall make report of the value of said property within six (6) months after their appointment to the mayor and city council, and said mayor and city council shall have the option, at the time within six (6) months after receipt of said report, to purchase said plant and property, together with all its appurtenances and equipments, at the appraised value."

That the amendatory ordinance, above referred to, granted by said city council of the city of Chicago to said Chicago Economic Fuel Gas Company was, and is, in the words and figures following, to wit:

An ordinance amending an ordinance granting to the Chicago Economic Fuel Gas Company the right to construct and operate works for the manufacture of fuel gas within the city of Chicago (passed July 13, 1891).

"*Be it ordained by the city council of the city of Chicago:*

SECTION 1. That the ordinance granted by the city council on the 22nd day of December, 1890, granting unto the Chicago Economic Fuel Gas Company the right to construct and operate works for the manufacture and distribution of fuel gas within the city of Chicago, be, and the same is hereby amended, as follows:

84 Sec. 1 of said ordinance is hereby amended so as to read as follows:

'SECTION 1. Subject to the terms and conditions of said ordinance there is hereby granted to the Chicago Economic Fuel Gas Company, its successors and assigns, the right to construct and operate works for the manufacture of illuminating and fuel gas within the city of Chicago; also, with the right of way along, upon and under all the avenues, streets, alleys and public places in said city, for the purpose of placing, operating, repairing and maintaining a line or lines of gas mains and pipes, and all necessary feeders and service pipes in connection therewith, for the distribution of illuminating gas and natural and manufactured fuel gas. Said gases shall at all times be of the best quality and highest efficiency for the purposes: *Provided, however*, That the successors and assigns referred to in this section, or elsewhere in this ordinance, shall not be construed to include any other gas company, trust or corporation, as provided in section 12 of this ordinance.'

Also, by amending section 7 of said ordinance of December 22, 1890, so that said section shall read as follows:

'SEC. 7. The right and privileges hereby granted are upon the

express condition that the price to be charged for the several kinds of gas shall not be in excess of the following rates: For illuminating gas the charge shall not exceed one dollar and ten cents ($1.10) per one thousand (1,000) cubic feet; for natural gas the charge shall not exceed sixty cents (60) per one thousand (1,000) cubic feet, and for manufactured fuel gas the charge shall not exceed fifty cents (50) per one thousand (1,000) cubic feet, with a rebate of ten cents (10) per one thousand (1,000) cubic feet on said above prices for illuminating, natural and fuel gas, in case of payment before the twelfth day of the month next succeeding that in which said gas is furnished; and to attempt to collect a greater rate than that herein specified shall work a forfeiture of the rights and privileges hereby granted. Said company shall commence work within six months from the passage thereof or this ordinance shall be null and void.'

Also by amending section 9 of said ordinance, so that said section 9 read as follows:

'SEC. 9. Said company shall pay annually to the city of Chicago, for and in consideration of the rights and privileges
85 hereby granted, an amount equal to three (3) per cent. of the gross revenue or receipts of said company from the sale of illuminating gas, and five (5) per cent. on the gross revenue or receipts of the said company from the sale of the natural gas or manufactured fuel gas. Such payments shall be made in the manner following: At the expiration of one year from the time when said company shall commence to distribute either illuminating gas or fuel gas to consumers in the city of Chicago, the president or other chief officer of the company shall file with the city comptroller a statement, under oath, showing the amount of the gross annual revenue or receipts of said company for the preceding year and shall, at the same time, pay to said comptroller the said amount of 3 per cent. on the annual gross revenue or receipts from the sale of illuminating gas, and 5 per cent. on the annual gross revenue or receipts from the sale of natural or fuel gas. Said respective payments to be made as herein prescribed, annually, during the terms of this ordinance. And, in addition to said payments, said company shall, by the said city of Chicago, furnish to said city illuminating gas at the rate of not to exceed seventeen dollars and fifty cents ($17.50) per lamp per annum during the term of this ordinance.'

Also, by striking out the word 'two,' occurring in the third line of section 10 of said ordinance, and inserting in lieu thereof, the word 'three.'

SEC. 2. This ordinance shall take effect and be in force from and after its passage."

That the original ordinance above referred to, granted by said city council of the city of Chicago to said Chicago Economic Fuel Gas Company was also amended by an ordinance passed by the city council of said city on December 29, 1890, which amendatory ordinance is in the words and figures following, to wit:

86 An ordinance amending an ordinance granting authority to the Chicago Economic Fuel Gas Company to construct and operate works for the manufacture of gas (passed December 29, 1890; accepted January 19, 1891).

"*Be it ordained by the city council of the city of Chicago:*

SEC. 1. That the ordinance passed by the city council of the city of Chicago, on the 22d day of December, 1890, granting unto the Chicago Economic Fuel Gas Company the right to construct and operate works for the manufacture and distribution of fuel gas, within the limits of said city, be and the same is hereby amended, as follows: By striking out the last paragraph in section 2, which reads as follows: 'Said company shall, when so ordered by a majority vote of all the alderman elected, extend their mains and supply-pipes on any street, avenue or other public highway contiguous to the pipes of said company at the time in use or operation; *Provided*, such extension shall cover territory one-half of which is improved by buildings.'

Also, by adding to section 3, the following:

'And it shall be the duty of said commissioner of public works to issue all permits asked for under this ordinance, without any delay and in accordance with the terms thereof.'

Also by striking out all after the first paragraph in section 13, so that said section 13 shall read as follows:

'SEC. 13. The rights and privileges granted by this ordinance shall be granted for the term of twenty-five (25) years from and after its acceptance, and all rights hereunder shall cease after the expiration of such time.'

SEC. 2. This ordinance shall take effect and be in force from and after its passage."

87 XX.

Your orator further shows that the Hyde Park Gas Company was incorporated in the year 1871 and subsequently was, by the town of Hyde Park, under an ordinance passed and approved June 24, 1871, and a subsequent ordinance passed and approved November 25, 1871, amendatory thereof, and a supplemental ordinance passed and approved March 15, 1875, given permission and authority to lay gas mains, pipes, feeders and service pipes in any and all the streets, alleys, avenues, parks and public grounds of the town of Hyde Park, which town of Hyde Park was subsequently and in the year 1889 annexed to and became a part of the city of Chicago, and has so remained thence hitherto: that subsequent to the incorporation of said Hyde Park Gas Company and the passage of said ordinance as aforesaid, said company erected a gas plant and laid gas mains in a part of the territory of Hyde Park formerly comprised in the town of Hyde Park, and manufactured and sold gas until the month of January, 1898, when it disposed of its said property and plant to your orator as aforesaid; that the ordinance, amendatory ordinance, and supplemental ordinance granted by said town of Hyde Park to

said Hyde Park Gas Company were and are in the words and figures following, that is to say:

88 An ordinance granting rights to the Hyde Park Gas Company to construct and operate gas works in certain territory (passed and approved June 24, 1871).

"*Be it ordained by the board of trustees of the town of Hyde Park;*

SECTION 1. That permission and authority irrevocable be, and the same are hereby granted to the Hyde Park Gas Company of the town of Hyde Park, and State of Illinois to lay their gas mains, pipes, feeders and service pipes in any and all of the streets, alleys, avenues, highways, parks, squares and public grounds throughout said town, north of the center line of Sixty-seventh (67) street, upon the following conditions:

1st. Said company, when they shall open the ground to lay any pipe or for any purpose whatever, shall restore the grounds, streets, pavements and sidewalks to a condition as good as before they opened them, and satisfactory to the superintendent of public works or such other person as the board of trustees may appoint with all convenient dispatch.

2d. This permission shall be exclusive north of the south line of Sixtieth (60) street, for the period of fifteen years from this date: *Provided*, The works of said company of sufficient capacity to supply said exclusive territory with gas, shall be erected and gas furnished within eighteen months from this date, and the works shall be kept in operation and gas supplied and that no more than three dollars and fifty cents per thousand cubic feet shall be charged for gas to consumers.

3d. That no transfer of the privileges hereby granted shall ever be made to any other company or corporation, or to any individuals except as hereinafter provided, and the general office of said gas company shall be forever kept in said territory over which said exclusive jurisdiction is hereby given.

SEC. 2. Whenever within the period of fifteen years from this date, in the opinion of the board of trustees of the town of Hyde Park, it shall appear to be for the benefit and interest of the said town that the works, gas mains, pipes, machinery, fixtures and all other property, real, personal and mixed, belonging to said Hyde Park Gas Company and necessary and convenient for the purpose of manufacturing and supplying the said town and the citizens thereof

89 with gas, should be owned and operated and controlled by the public authorities of said town, the said Hyde Park Gas Company shall surrender ownership, possession and full control to the said board of trustees of said town of Hyde Park for the use and benefit of said town, all of said property, real personal and mixed, together with all works, machinery, fixtures, gas mains, pipes, feeders and materials used in the manufacture of gas then on hand upon the payment to said Hyde Park Gas Company of the actual cost thereof, adding thereto the sum of ten per cent. per annum interest, from the time of such expenditure until such payment is made, deducting therefrom such sums as may have been realized by said

company as net revenue from said work; such cost, interest and net revenue to be ascertained by three sworn commissioners, one to be appointed by said board of trustees, one by said Hyde Park Gas Company, and a third by a judge of the circuit court of the county of Cook, State of Illinois: Provided, that the board of trustees shall have no power to accept of this option and make such purchase except for the sole use of the town, and that the works shall be exclusively owned and operated by said town.

SEC. 3. The privileges, grants and franchises contained herein are hereby declared null and void unless the said Hyde Park Gas Company shall, before the expiration of thirty days from this date, file with the clerk of this board their written acceptance and assent to the conditions set forth in this ordinance.

See following ordinances.

Passed and approved November 25, 1871.

SEC. 6. Be it ordained by the board of trustees of the town of Hyde Park: That section 2 of the ordinance relating to the Hyde Park Gas Company, adopted by this board on the 24th day of June, A. D. 1871, be and the same is hereby repealed."

An ordinance granting further rights to the Hyde Park Gas Company (passed and approved March 15, 1875).

"SEC. 7. Be it ordained by the president and board of trustees of the village of Hyde Park: That permission and authority be, and the same are hereby granted to the Hyde Park Gas Com-
90 pany, of the village of Hyde Park, to lay their gas mains, pipes, feeders and service pipes in any and all of the streets, alleys, avenues, highways, parks squares and public grounds throughout said village south of the center line of Sixty-seventh street, upon the following conditions to wit:

1st. Said company, when they shall open the ground to lay any pipe, or for any other purpose whatever, shall restore the grounds, streets, pavements and sidewalk to a condition as good in all respects as before they opened them, and satisfactory to the superintendent of public works, or such person as the president and board of trustees of said village shall from time to time appoint. Such restoration to be made without unreasonable delay, and all excavations to be made in such manner that the public shall not be unnecessarily inconvenienced thereby.

2d. Said gas company to be responsible for any and all damages which may be occasioned by or result from the exercise of the permission or authority of this ordinance, conferred to or upon said company."

XXI.

Your orator further shows that the Mutual Fuel Gas Company was incorporated on or about April 25, 1889, for the purpose of manufacturing, distributing and selling gas, and the utilization of the same in the production of light, heat and power in the village of Hyde Park, and the said village of Hyde Park granted to Hank &

McClary, assignors of said Mutual Fuel Gas Company, the right, by ordinance, to lay down, operate and maintain gas mains and supply gas within the village of Hyde Park for both heating and lighting purposes; that thereafter said Mutual Fuel Gas Company erected works and engaged in the business of manufacturing and selling gas in a part of the town of Hyde Park, until it disposed of its property and plant to your orator, in the month of January, 1898, as hereinbefore alleged; that the ordinance granted to said Mutual Fuel Gas Company by said village of Hyde Park was, and is, in the words and figures following, that is to say:

91 An ordinance granting rights to Hank & McClary to construct, operate, and maintain gas works and to pipe oil in certain territory (passed, approved, accepted, and filed March 21, 1889).

"Be it ordained by the president and board of trustees of the village of Hyde Park:

SECTION 1. That permission and authority be, and are hereby granted to Charles D. Hank and Nelson A. McClary subject to the provisions hereinafter contained to construct, maintain and operate a system of works within the village of Hyde Park, to enable said Hank and McClary, or their assigns, to receive, produce and furnish for sale, natural and other gas and petroleum oil, or either of them; and to enable said Hank and McClary and their assigns to deliver such gas and oil to their customers, the right of way is hereby granted to them, along, upon and under all avenues, streets, alleys and public places, rivers and canals in said village, for the purpose of laying, operating, maintaining and repairing pipes, tubes, feeders and service pipes in connection with the said business of said Hank and McClary and their assigns: *Provided*, That this ordinance shall not grant authority to pipe oil north of 67th street in said village.

SEC. 2. Said Hank and McClary, or their assigns, shall do no permanent injury to any street, sidewalk, alley, avenue or public place, or in any manner unnecessarily disturb or interfere with any water pipes, sewer or gas pipe, telegraph or electric wires, cables or pipes now laid, or hereafter to be laid, by, or by authority of said village; that in laying their said pipes no greater distance than one-quarter of a mile shall be opened at any one time, and the work shall be done continuously and speedily prosecuted to completion under the direction of the superintendent of public works, or other proper officer of said village; that any streets, lanes, road- or alleys open for the purpose aforesaid shall be immediately restored to a condition equally as good as before opened by or for the benefit of said Hank and McClary and their assigns, by the superintendent of public works or other proper officer of said village, and the said superintendent of public works or other proper officer of said village shall make an estimate of the cost of restoring each section
92 not exceeding one-quarter of a mile, as aforesaid, to a condition equally as good as before; and payment of the amount of the said estimates shall be made by said Hank and McClary, or their assigns, to the comptroller of the said village before such

street, lane, road or alley shall be opened and in no case shall the village be held liable for any loss or damage that may occur in the restoring of such street, lane, road or alley as aforesaid; *Provided, however,* That if the said Hank and McClary and their assigns shall restore each section, as aforesaid, of said street, lane or alley to a condition satisfactory to the superintendent of public works, or other proper officer of said village within fifteen (15) days after the same shall have been opened by or for said Hank and McClary, or their assigns, then the amount of deposit as aforesaid shall be returned to said Hank and McClary, or their assigns, upon the order of the said superintendent of public works or other proper officer.

SEC. 3. Said Hank and McClary, or their assigns, shall put up all necessary barriers, lights and signals to prevent the happening of any accident in consequence of any opening or incumbrance of any street, alley, lane, avenues or other public ground in said village.

SEC. 4. Said Hank and McClary, or their assigns, shall be liable to, and by the acceptance of this ordinance, agree to pay and compensate the village of Hyde Park, or any private individual, owner or parties interested in any property adjacent to any street, avenue, alley or public ground opened or injured by them, for all damages such party may suffer caused by or resulting from negligence or want of proper care or skill in the construction of their works or lines of pipes, or in opening, incumbering, refilling or guarding any opening or construction of any street, alley, or public place in said village or growing out of the escape of any oil or gas contained in or conducted through such pipes or tubes of said company.

SEC. 5. Said Hank and McClary, or their assigns, shall be subjected to all general ordinances of the village of Hyde Park in regard to gas company or companies of a similar character or business or relating to the supply of petroleum oil, now in force or which may be hereafter passed.

SEC. 6. The village of Hyde Park, for itself and citizens reserves the right to put in sewerage, water and other pipes, and any and all improvements which it may deem necessary or proper, at any and all times, in its streets, alleys or public grounds without any
93 liability to said Hank and McClary o- their assigns, for so doing, and on reasonable notice said Hank and McClary, or their assigns, shall take proper care of their own pipes and property in such streets, alleys or public grounds.

SEC. 7. Whenever the board of trustees or their successors shall provide for the improvement of any street by paving or macadamizing the same, the said Hank and McClary, or their assigns, shall, within sixty (60) days after receiving notice from the department of public works, or other proper authority, cause pipes suitable for the supply of gas upon said street to be laid therein, including such main or service pipes, feeders, and house connections to the curb lines of said street and connecting with the building lots thereon, as may be necessary or proper. *Provided, however,* That said Hank and McClary, or their assigns, shall not be required to lay pipe in any such street unless ordered so to do by the board of trustees, unless the pipe so laid shall connect with the general system of said

Hank and McClary, or their assigns; and *provided, further*, that in case of the failure of said Hank and McClary, or their assigns, after such notice to lay such pipe and connections prior to such improvements, said Hank and McClary and their assigns shall not thereafter have the right to tear up said street nor any part thereof, except upon permission of the board of trustees or their successors, first specially had and obtained.

SEC. 8. Said Hank and McClary or their assigns, shall, unless prevented by due process of law, commence the erection of gas works within six months from the date of passage of this ordinance, and shall complete said works and furnish gas for fuel, power, light or heat within eighteen (18) months from said date, said works to be commenced and completed in good faith, to be of a permanent character and to have a capacity of not less than two hundred and fifty thousand (250,000) cubic feet of gas per day and to be intended to produce and supply to consumers regularly not less than said 250,000 cubic feet of gas per day. If said Hank and McClary or their assigns, shall fail to so commence said works and complete the same, and furnish gas within said periods of six (6) and eighteen (18) months or having commenced to supply gas, they shall, unless for causes beyond the control of said Hank and McClary, or their assigns, cease to supply gas for fuel, power, light or heat for a period of more than thirty (30) days, then the rights and privileges hereby granted shall cease and be of no more force and effect. *Pro-*
94 *vided, however*, That if said Hank and McClary, or their assigns, shall be delayed by any ordinance or resolution of the village of Hyde Park, then the period of any and all such delays shall be added to said periods of six (6) and eighteen (18) months.

SEC. 9. The pipes for oil and for high-pressure natural gas, that is having a pressure exceeding ten (10) pounds to the square inch shall be of wrought iron of the best material and with joints of the best known character for securing natural gas or oil. Said pipes shall be placed at least three (3) feet below the surface of the ground, and it is hereby made the duty of said Hank and McClary or their assigns, to provide an escape system to carry off superfluous natural gas or oil to relieve undue pressure and prevent explosion.

SEC. 10. Said Hank and McClary shall forfeit and pay to the said village of Hyde Park the sum of twenty thousand ($20,000) dollars, as liquidated damages in case they or their assigns shall fail to commence the erection of gas works within six (6) months from the date of the passage of this ordinance, or in case they shall fail to complete said works and furnish gas within eighteen (18) months from said date, as provided by section 8 hereof; and said Hank and McCleary shall, within sixty (60) days from and after the date of the passage of this ordinance, execute and file with the president of the village of Hyde Park, a good and sufficient bond in the penal sum of fifty thousand ($50,000) dollars, to be approved by the board of trustees, conditioned, that said Hank and McClary and their assigns, shall at all times save said village harmless from and on account of all injury to persons or property that may be caused by the acts of the said Hank and McClary, or their assigns, or their employés, or

by the escape of their gas or oil, and to make good and pay for all injury and damage to the property of the said village of Hyde Park that may be in anywise caused by the operations of the said Hank and McClary, or their assigns, hereunder, and further conditioned to pay the said village of Hyde Park said sum of twenty thousand ($20,000) dollars, liquidated damages provided for in this section.

SEC. 11. Said Hank and McClary, or their assigns, shall not charge or collect more than one dollar and twenty-five cents ($1.25) per thousand cubic feet for gas for illuminating purposes, not more than ninety cents ($.90) per thousand cubic feet for gas for heating purposes, with a rebate of twenty per cent. (20 per cent.) on said
95 above prices in case of payment on or before the twelfth (12th) day of the month next succeeding that in which such gas is used by consumers thereof. When said Hank and McClary, or their assigns shall furnish illuminating gas, the said Hank and McClary, or their assigns, shall supply gas light under uniform and sufficient pressure between sunset and sunrise of each day, and the equality of the same shall be as nearly uniform as practicable averaging for any one month not less than sixteen (16) sperm candles burning one hundred and twenty (120) grains per hour; to be determined by authorized photometrical tests, a five (5) foot burner being used, and provided the rights and privileges hereby granted are upon the express condition that said Hank and McClary, or their assigns, shall not charge the village of Hyde Park more than ninety cents ($.90) per thousand cubic feet for illuminating gas, and not more than sixty-five ($.65) per thousand cubic feet for heating gas.

SEC. 12. No transfer of the privileges hereby granted shall ever be made except by said Hank and McClary, but no transfer shall be made by their assigns, and should Hank and McClary, or their assigns, become a party to any trust or combination respecting the quantity or quality or price of gas or oil, *and* such transfer, combination or transaction shall work a forfeiture of the rights and privileges hereby granted.

SEC. 13. This ordinance shall take effect and be in force when and as soon as said Hank and McClary, or their assigns, shall file with the clerk of the village of Hyde Park their acceptance in writing thereof, together with their bond, as hereinbefore provided, and in case said Hank and McClary, or their assigns, shall not file said acceptance in writing, and said bond, within sixty (60) days after the passage and approval of this ordinance, then this ordinance shall be and become void and without force and effect."

XXII.

And your orator further shows unto your honors that the Calumet Gas Company was organized under the general incorporation act of the State of Illinois and obtained permission from the village of Hyde Park to lay down, maintain and operate pipes, mains
96 and feeders for a certain portion of the territory formerly comprised in the villege or town of Hyde Park, to wit, that territory south of the center line of Sixty-ninth street in the village of Hyde Park, which said territory was subsequently annexed to

and became a part of and has since remained a part of the city of Chicago. That said Calumet Gas Company thereafter manufactured and sold gas in part of said territory until said Calumet Gas Company disposed of its plant and property to your orator, in November, 1898, as hereinbefore set forth and alleged, and that the ordinance granted by the village of Hyde Park to said Calumet Gas Company was and is in the words and figures following, that is to say:

An ordinance granting rights to the Calumet Gas Company (passed and approved November 9, 1885).

"*Be it ordained by the president and board of trustees of the village of Hyde Park:*

SECTION 1. That permission and authority be and the same is hereby granted to the Calumet Gas Company, a corporation of the State of Illinois, to lay its gas mains, pipes, feeders and service pipes in any and all the streets, alleys, avenues, highway-, parks, squares and public grounds throughout the village of Hyde Park, south of the center line of Sixty-seventh street, upon the following conditions.

SEC. 2. Said Calumet Gas Company, when it shall open the ground to lay any pipes, or for any purpose whatever, shall without delay restore the grounds, streets, pavements and sidewalks to a condition as good as before they opened them and satisfactory to the superintendent of public works, or such other person as the board of trustees may appoint.

SEC. 3. The works of said Calumet Gas Company, shall be of sufficient capacity to supply said territory, and shall be commenced within six months, and gas furnished within eighteen months from the passage of this ordinance, and no more than two ($2.00) dollars per thousand cubic feet shall be charged to consumers; provided, however, that in case payment shall be made by said consumer on or before the twelfth day next after the month in which the
97 gas shall be consumed, a rebate of twenty-five (25) cents per thousand cubic feet shall be allowed to such consumer.

SEC. 4. The works of said Calumet Gas Company shall be located at a point south of the center line of Eighty-third street.

SEC. 5. The said Calumet Gas Company shall not have any privileges or rights in the territory bounded on the north by Ninety-fifth street, on the east by the center of Stony Island avenue, and on the south by the south line of Hyde Park, and on the west by the west line of Hyde Park.

SEC. 6. The said Calumet Gas Company, its successors and assigns, shall be subject to all the general ordinances of the village of Hyde Park in relation to gas companies, now in force, and which shall hereafter be in force in relation to the government of gas companies, and shall save and keep harmless the said village of and from all claims for damages growing out of any act on the part of said company, its successors or assigns, or their agents or servants.

SEC. 7. This ordinance shall be in force from and after its passage."

That said ordinance granted by said village of Hyde Park to said Calumet Gas Company was, on November 17, 1887, amended by an ordinance in the words and figures following, to wit:

An ordinance amending an ordinance granting rights to the Calumet Gas Company (passed, approved, and filed November 17, 1887; accepted November 18, 1887).

"Be it ordained by the president and board of trustees of the village of Hyde Park: That section 1 of an ordinance granting rights and privileges to the Calumet Gas Company, passed November 9, 1885, be and the same is hereby amended to read as follows:

That permission and authority be and the same is hereby granted to the Calumet Gas Company, a corporation of the State of Illinois, to lay its mains, pipes, feeders and service pipes, in any and all the streets, alleys, avenues, highways, parks, squares and public grounds throughout the village of Hyde Park."

98 XXIII.

Your orator charges that in and by said statute of the State of Illinois, by virtue of which said Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company, severally, disposed of their manufacturing plants and pipes, mains and feeders aforesaid to your orator, it is provided that any corporation purchasing or leasing the property of the company or companies, or into which any company or companies are consolidated and merged, shall be, at the time of such purchase, lease or merger, in the actual business of furnishing gas to consumers, and shall be subject to the following provisions: Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger, and shall furnish gas as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger.

Your orator charges the fact to be that during the year immediately preceding the acquisition by your orator of the plants, pipes and mains of the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company, as aforesaid, your orator was extensively engaged in the actual business of furnishing gas to consumers, in the city of Chicago, and that your orator charged and received for all illuminating gas sold by it the net rate or price of one dol-
99 lar per thousand cubic feet; that since the acquisition of said plants and property aforesaid your orator has uniformly charged the same net rate or price for all illuminating gas sold by

it in the city of Chicago, and the gas so supplied and sold by your orator has been, as matter of fact, better in quality and of higher candle-power than the gas theretofore sold by the companies, the plants, pipes and mains of which, severally, were as aforesaid acquired and taken over by your orator; and your orator charges, as matter of law, that the price or rate thus fixed was a fixing and regulating by the State of Illinois of the price or rate to be charged by your orator for all gas supplied by your orator subsequent to the acquisition by your orator of the manufacturing plants, pipes and mains of said gas companies aforesaid.

XXIV.

Your orator further shows that from and after the acquisition and taking over by your orator of the property aforesaid from said Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company, your orator has furnished and supplied to consumers of gas formerly in part supplied by said companies, severally, all the gas required by said consumers; that all the streets, avenues, highways, public squares and places within the city of Chicago, except those lighted by the said city by means of the municipal electric lighting plant, have been lighted by means of the gas manufactured and distributed by your orator; that your orator has furnished a gas of higher candle-power than was ever furnished by any of said companies, the property of which companies was so acquired and taken over as aforesaid by your orator; that your orator has extended, enlarged, improved and bettered the plants, mains and property it acquired from said Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company; that it has connected the pipes, mains and systems so as aforesaid acquired by it, with the pipes and mains that were, at the time of such acquisition, the property of your orator, making all necessary extensions of said pipes and mains for that purpose, and extended, connected, enlarged and improved the same, with the sole purpose and object of improving the service rendered and to be rendered by your orator to the city of Chicago and the inhabitants thereof, consumers of gas; that in extending, enlarging, improving, completing and bettering its system of gas mains, pipes, feeders and appliances, your orator has always and in every case proceeded under and acted upon and by virtue of the franchise, power and authority contained in its charter and by the consent of the city of Chicago aforesaid, and that in any of the acts which your orator has done as aforesaid since the acquisition by your orator of the property and plant of said several

companies as aforesaid your orator has never acted under any of the powers, franchises or privileges granted to or held by said several companies or any or either of them, and that in putting down, maintaining and operating works, plants, mains, pipes, feeders and appliances since August 5, 1897, your orator has not availed itself of any of the powers or privileges granted to the said Chicago Gas Light and Coke Company, or to the other companies aforesaid, or any or either of them, the property of which companies was so as aforesaid acquired and taken over by your orator; but, on the contrary, your orator charges the fact to be that every act and thing done by the People's Gas Light and Coke Company since
101 August 5, 1897, in laying, maintaining, using, conducting and operating its plants and property, gas mains, pipes, feeders and appliances and appurtenances, and in carrying on its business and affairs, throughout the city of Chicago, in the way of manufacturing, distributing and selling gas to the city of Chicago and to the inhabitants thereof, consumers of gas, has been solely and exclusively under and by virtue of the power and authority, franchise and privilege, granted to your orator by its charter aforesaid and by and with the consent of the city of Chicago.

XXV.

Your orator further shows that in addition to the People's Gas Light and Coke Company and the gas companies, the properties of which, severally, were acquired by your orator as aforesaid, there were then and are now other gas companies engaged in the manufacture, sale and distribution of gas in the city of Chicago, as well as a number of electric light companies engaged in distributing light to the inhabitants of the city of Chicago, consumers thereof; that said city of Chicago has built, and maintains and operates a considerable electric light plant, by means of which a part of the streets of said city are lighted.

XXVI.

Your orator further shows that the city of Chicago had full knowledge of the acquisition and taking over by your orator of the property aforesaid of said other gas companies heretofore named, and consented to the acquisition and taking over of said property by your orator, and in various ways approved, ratified and confirmed the acquisition and taking over of said property and the use thereof by your orator as aforesaid, under your orator's charter; and in this connection your orator states the fact to be that in the year 1899 your orator and the city of Chicago entered into a certain agreement in the words and figures following, that is to say:

102 "An agreement, made this twentieth day of July, 1899, between the City of Chicago and the People's Gas Light and Coke Company (herein called the People's Company).

Whereas, the city of Chicago desires to arrange for a continuance of the lighting of the streets and other public places of the city for the remainder of the current year, upon the same terms as those

upon which said lighting was done in the year 1898, and to secure the benefit of rebates upon the price of gas furnished, as hereinafter set forth:

A certain agreement for the lighting of streets and other public places was entered into on the 17th day of June, 1891, between the City of Chicago on the one part, and the People's Company and certain other gas companies, viz: the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company, the Hyde Park Gas Company, the Lake Gas Company and the Suburban Gas Company, on the other part, and said agreement of June 17, 1891, was extended under certain other contracts subsequently made by the city of Chicago, and expired on December 31, 1897, and is no longer in force or effect. In August, 1897, the several other gas companies last above mentioned, excepting the Hyde Park Gas Company, were consolidated and merged into the People's Company, and subsequently, on January 10, 1898, there was also consolidated and merged into the People's Company said Hyde Park Gas Company. For the year 1898 no written contract was made by the city of Chicago with the People's Company for gas, but the People's Company furnished gas to the city upon substantially the following terms: For street lamps supplied with gas of not less than 24-candle power, through burners consuming four feet per hour, lighted in accordance with the time-table of 3,786 hours and 11 minutes per annum, and including the lighting, cleaning, extinguishing, furnishing and placing glass for lamps,
103 repairing of all attachments except lamp frames, likewise the labor and alcohol for thawing, repairing stiff keys, furnishing and keeping in repair lamp-cocks, nipples, burners, tips, etc., the sum of twenty dollars per lamp, provided the bills therefor were paid within thirty days from the end of each quarter of the year, or judgment therefor was promptly obtained, where cash w-s not available. For gas of not less than 24-candle power furnished in public buildings and places, other than for street lamps, the price of $1.25 per thousand cubic feet, with a rebate of twenty-five cents per thousand cubic feet on bills paid within thirty days after the same were rendered.

There was credited by the People's Company to the city of Chicago upon the amount owing by the city of Chicago to the People's Company, for the year 1896, as aforesaid, three and one-half (3½) per cent. upon the gross receipts from the sales of gas by the People's Company during said year, including the gross receipts from the operations of the properties of said companies consolidated, as aforesaid, with the People's Company. For the first three months of the year 1899 the People's Company has been paid for gas furnished and work done at the same prices as for the year 1898, and the People's Company has paid, or allowed as a rebate upon the bills for such three months, the 3½ per cent. of its gross receipts from the sales of gas during such period, including the receipts from the operations of the properties of said companies so consolidated, as aforesaid, with the People's Company.

And whereas, the city council of the city of Chicago did at its

regular meeting, held July 6th, 1899, pass the following order, to wit:

'*Ordered*, That the mayor and comptroller be and they are hereby authorized and directed to arrange for the continuance of the lighting of the streets and other public places of the city of Chicago for the remainder of the current year upon the same terms with those upon which said lighting was done in the year 1898. And it is further

104 *Ordered*, That said mayor and said comptroller be and they are hereby authorized and directed to permit judgments to be entered against said city of Chicago for the cost of said lighting in excess of the amount provided therefor in the last annual appropriation bill,' and this agreement is made under and in pursuance with the authority and direction in said order contained;

Now, therefore, in consideration of the premises, this agreement witnesseth:

1. The People's Company shall continue to light the streets and public buildings and other public places of the city of Chicago for the remainder of the year 1899 upon the same terms as for the year 1898, as above set forth.

2. The People's Company shall pay or credit upon the amount payable by the city of Chicago hereunder the amount of 3½ per centum upon the gross receipts of the People's Company, during the year 1899, from the sales of gas, and there shall be included in the said gross receipts the receipts from the operations of the properties of each of said gas companies which have been heretofore consolidated with the People's Company, as aforesaid. The payment or allowance of said 3½ per centum of gross receipts shall cease and discontinue if the existing franchises of said People's Company, or of any of said gas companies, so consolidated with the People's Company, shall not be recognized by the city of Chicago, or if the same, or any of them, shall be attacked by or at the instance of said city, or if the People's Company shall be prevented by the city of Chicago from extending its main in territory which has been, or may be annexed to said city. The city of Chicago shall have the right, at any time, to examine the books and accounts of the People's Company, to verify the statement of the People's Company as to the amount of said 3½ per cent. of its gross receipts from the sales of gas for

105 the year 1899; there shall be a statement furnished quarterly to the mayor of the city of Chicago by the president or secretary of said gas company, verified under oath of the officers making the same, showing the gross receipts of said company as aforesaid.

The Chicago Economic Fuel Gas Company having also been consolidated with the People's Company, there shall be paid to the city of Chicago, or credited upon money owing by the city of Chicago to the People's Company, the five per centum of the receipts from the sale of natural gas as specified in the ordinance granted by the city of Chicago to said Chicago Economic Fuel Gas Company.

4. The city of Chicago shall pay in cash, on or before August 1st, 1899, the net amount due the People's Company hereunder for the months of April, May and June, 1899. The net amount which will

be due for the months of July, August and September shall be payable on or before November 1st, 1899, and in case the city has not sufficient funds available to pay said amount, the People's Company shall receive a judgment therefor of a court of competent jurisdiction, at the term of such court at which suit may be instituted therefor by the People's Company. The net amount which will be due for the months of October, November and December, 1899, shall be payable on or before February 1st, 1900, and if the city of Chicago has not sufficient funds available to pay said amount the People's Company shall receive a like judgment therefor, at the term at which suit may be brought for the same. In the event that the People's Company shall not obtain such judgments, or either of them, for such deficiency or deficiencies, upon suit being brought therefor, as aforesaid, the People's Company shall be entitled forthwith to discontinue the supply of gas to the city of Chicago.

In witness whereof, the City of Chicago has executed this agreement, by its mayor and city comptroller, in that behalf duly
106 authorized, and the People's Gas Light and Coke Company has caused this agreement to be executed by its president, and its corporate seal to be hereunto attached, duly attested by its secretary.

CITY OF CHICAGO,
(Signed) By CARTER H. HARRISON, *Mayor.*

WILLIAM D. KERFOOT,
City Comptroller.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
By C. K. G. BILLINGS, *President.*

Attest:
[SEAL.] L. A. WILEY, *Secretary.*"

XXVII.

Your orator further shows that since August 5, 1897, the city of Chicago, by the common council thereof, has recognized the right of your orator to acquire and take over the property of said gas companies, and to use, operate and extend the same under and by virtue of your orator's charter, and has evidenced its acquies-ence in and consent and approval of such acquisition and taking over, use, conduct and operation thereof, by a large number of affirmative acts wholly inconsistent with the claim, if it should now be put forth, that said property was not lawfully acquired and taken over, and ever *said* has been maintained and used and operated by your orator, or that said property was acquired without the knowledge and consent of said city of Chicago; that among said acts of recognition and consent are the following:

1. At a meeting of the city council of the city of Chicago, held May 2, 1898, the following order was passed:

"Ordered, that the commissioner of public works be and he is

hereby directed to notify the People's Gas Light and Coke
107 Company to put in gas stubs on Cornelia street, from Western avenue to Rockwell street, and on Cortez street, from Western avenue to California avenue."

2. At a meeting of said city council, held July 6, 1898, the following order was passed:

"Ordered, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to place gas mains in Blucher street, from Lill place to Wood street."

3. At a meeting of said city council, held July 11, 1898, the following order was passed:

"Ordered, That the commissioner of public works be and he is hereby directed to order the People's Gas Company to lay their main and other pipes in Beach court, south of Irving Park boulevard, in order that the contractor may proceed with his work."

5. At a meeting of said city council, held November 6, 1899, the following order was passed:

"Ordered, That the commissioner of public works be and he is hereby directed to have the People's Gas Light and Coke Company lay the service pipes and mains in Evanston avenue, from Devon avenue north to city limits."

6. At a meeting of said city council, held November 20, 1899, the following order was passed:

"Ordered, That the People's Gas Light and Coke Company be and is hereby ordered to lay gas mains in the following streets, to wit, Herndon street, from Beldon avenue south to Garfield avenue north."

9. At a meeting of said city council, held January 3, 1900, the following order was passed:

"Ordered, The People's Gas Light and Coke Company is hereby directed and instructed to lay gas main in Ridgeway avenue, from Armitage avenue to Courtland avenue."

10. At a meeting of said city council, held January 8, 1900 the following order was passed:

"Ordered, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke
108 Company to lay gas mains in Ridgeway avenue, from Armitage avenue to Courtland street."

11. At a meeting of said city council, held February 5, 1900, the following order was passed:

"Ordered, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to lay their gas mains in Turner avenue, between Twenty-third and Twenty-sixth streets, as the street is now being graded, preparatory to paving."

12. At a meeting of said city council, held June 25, 1900, the following order was passed:

"Ordered, That the commissioner of public works order the People's Gas Light and Coke Company to lay gas main on Central

Park avenue, between Douglas boulevard and Twelfth street before street is paved."

13. At a meeting of said city council, held June 25, 1900, the following order was passed:

"Ordered, That the People's Gas Light and Coke Company be and they hereby are directed to lay gas mains and pipes in Wrightwood avenue, at all places now in process of being paved, and not already supplied with gas mains and pipes."

14. At a meeting of said city council, held July 9, 1900, the following orders were passed:

"Ordered, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to lay gas mains in Melrose street, from Kimball avenue to Drake avenue, and in School street, from Kimball avenue to 500 feet west."

"Ordered, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to lay gas main at once in Milwaukee avenue from Allen avenue to Belmont avenue."

15. At a meeting of said city council, held November 12, 1900, the following order was passed:

"Ordered, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to lay gas mains in Monticello avenue, between Armitage avenue and Courtland street."

109 16. At a meeting of said city council, held January 7, 1901, the following order was passed:

"*Ordered*, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to lay gas mains in North Kedzie avenue, between School street and Roscoe street."

17. At a meeting of said city council, held February 18, 1901, the following order was passed:

"*Ordered*, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to lay gas mains at once in the following-named streets:

North Springfield avenue, from Irving Park boulevard to West Berteau avenue.

North Avers avenue, from Irving Park boulevard to West Montrose avenue.

North Harding avenue, from Irving Park boulevard to West Cullom avenue.

North Ridgeway avenue, from Elston avenue to West Montrose avenue.

North Lawndale avenue, from West Belle Plaine avenue to West Montrose avenue.

North Monticello avenue, from Irving Park boulevard to West Montrose avenue.

North 40th avenue, from Elston avenue to West Montrose avenue."

18. At a meeting of said city council, held March 11, 1901, the following order was passed:

"*Ordered*, That the commissioner of public works be and he is hereby directed to notify the People's Gas Light and Coke Company to lay gas mains in Elston avenue, from Montrose avenue to North 43d avenue; in Hamlin avenue, from Irving Park boulevard to Montrose avenue, and in Melrose street, from Elston avenue to California avenue."

110 XXVIII.

Your orator further shows that it paid to the city of Chicago, in cash, upwards of $300,000 under said agreement dated July 20, 1899, and that it has in each year since August 5, 1897, paid to said city of Chicago, the 5 per centum of the receipts from the sale of natural gas specified in the ordinance granted by said city of Chicago to the Chicago Economic Fuel Gas Company, and that it has at heavy expense, in all things complied with the orders and directions of the city council of the city of Chicago respecting the laying down of pipes, mains and services, and the supplying of gas, as specified in the orders set out in the twenty-seventh paragraph of this your orator's bill of complaint; which pipes, mains and services have been laid in all divisions of the city of Chicago; and your orator charges that, relying upon its charter rights, and upon the recognition thereof and acquiescence therein by the city of Chicago, your orator has from time to time expended large sums of money in acquiring lands in various sections of the city of Chicago, upon which it has placed its retorts, buildings, holders and other apparatus since August 5, 1897, and has expended large sums of money in laying down gas mains, pipes, feeders and other appliances and appurtenances throughout the city of Chicago, and in all sections thereof, and in maintaining, improving and extending its system of pipes, mains, feeders and plants, and in carrying out and performing the orders and directions contained in the said several resolutions, orders and ordinances of the city council of the city of Chicago, hereinbefore set forth, and otherwise, in connection with perfecting its system of mains, plant, pipes, feeders and appurtenances; that since August 5, 1897, said city of Chicago has issued to your orator upwards of seventy-five thousand permits authorizing your orator to make excavations in the public streets throughout the city of Chicago, and in
111 all divisions thereof, for the purpose of laying down pipes, mains, feeders and service pipes, and in repairing, renewing, extending, enlarging, improving and completing the same; and your orator charges that each and every permit so issued by the city of Chicago to your orator since August 5, 1897, was and is a separate and distinct recognition and affirmance by the city of Chicago of the right by your orator to maintain and use the pipes, mains, feeders and appliances of your orator in the streets, alleys, highways, public ways, places and squares throughout the city of Chicago; and in this connection your orator shows and states the fact to be that there are hundreds of miles of gas pipes in the streets of the city of Chicago acquired as aforesaid by your orator from said Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the

Suburban Gas Company, the Lake Gas Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company, that are no longer available for use in distributing gas, by reason of the fact that they were laid at an early day, were small in size, and are, by reason of wear and decay, no longer available, nor can they be, nor are said pipes now, used in distributing gas to consumers; that in all such cases your orator has put down under authority of its charter and ordinance from the city of Chicago, and under authority of the permits issued by the city of Chicago to your orator, new and enlarged pipes and mains, which pipes and mains your orator now maintains, uses and operates under the power and authority contained in the charter granted to it by the State of Illinois, and the consent of the city of Chicago, as aforesaid, in supplying gas to consumers, residents of the city of Chicago, and to the city of Chicago; that since acquiring the plants, pipes and mains of the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the
112 Suburban Gas Company, the Lake Gas Company, the Chicago Economic Fuel Gas Company, the Illinois Light, Heat and Power Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company, and the Calumet Gas Company, the constant aim and purpose of your orator has been to extend and enlarge the same, and the system of plants, pipes, mains and feeders of your orator, and to improve and better the service of furnishing gas rendered and to be rendered by your orator to the residents of the city of Chicago, consumers of gas, and to the city of Chicago. That your orator is constantly engaged in replacing and renewing pipes and mains heretofore laid in the streets of the city of Chicago, either by your orator or by the companies whose property was acquired by your orator, with larger pipes and mains, in order to keep pace with the increased and constantly increasing demands made upon your orator to supply the residents of Chicago, and the city of Chicago, with gas; and your orator has been constantly so engaged since August, 1897, (all of which is evidenced by the large number of permits for opening the streets of Chicago issued to your orator by the city of Chicago as aforesaid); that for nearly fifty years continuously, your orator has been, and now is, furnishing gas to consumers thereof in Chicago, and to the city of Chicago, by virtue of its own right and authority and under its own franchises, and on the enlargement of its system, plants and property, by the acquisitions aforesaid, it continued to manufacture and supply gas as theretofore, under the power and authority contained in its charter, as aforesaid, and the consent of the city of Chicago, and not by virtue of the franchise or in discharge of any duty of any or either of said companies, the property and plant of which was acquired by your orator as aforesaid; that your orator is the identical corporation and entity created by said charter aforesaid, and is the corporation which, under the powers and privileges contained in said charter and by and

with the consent of the city of Chicago as aforesaid, is furnish-
113 ing gas to the city of Chicago, and to the consumers of gas resident in said city of Chicago; and your orator charges the fact to be that it would be practically impossible at this time to distinguish the pipes, mains and feeders laid and placed by your orator and those acquired by your orator from the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company, and the Calumet Gas Company, because many hundred miles of the pipes so acquired have been taken up and removed by your orator because no longer serviceable, and no longer adapted to the demands of the service at the place or places where the same were originally laid; that upwards of five hundred miles of gas mains and pipe have been newly laid by your orator in all sections and divisions of the city of Chicago since August 5, 1897, in extending, enlarging, improving and bettering the plant and system of your orator, until, at this time, the system of pipes, mains, feeders and appliances of your orator has been largely, if not entirely, remodeled, relaid and improved, and it has at this time become and is practically impossible to determine what pipes, mains and feeders, if any such there be remaining, were acquired from said Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company; that while it is undoubtedly true that many miles of such pipes still remain in the streets of the city of Chicago, it is likewise true that in places your orator has taken up for long distances the mains and pipes originally laid, and put down in lieu thereof other and larger pipes and mains of greater capacity and improved quality, and conducted through the same the gas manufactured by your orator.

114 And in this connection your orator further shows, and charges the fact to be, that the entire system of pipes, mains and feeders acquired as aforesaid by your orator from the Consumers' Gas Company, except as the same has been changed, cut out, enlarged, relaid, replaced or improved by your orator since August 5, 1897, was connected with the system of pipes, mains and feeders acquired by your orator, from the Chicago Economic Fuel Gas Company, and thereafter by your orator used solely in the distribution of natural gas, for fuel and heating purposes; that substantially all of the system of pipes, mains and feeders acquired as aforesaid by your orator from the Equitable Gas Light and Fuel Company, except so far as the same has been changed, cut out, enlarged, relaid, replaced or improved by your orator subsequent to August 5, 1897, has likewise been devoted exclusively to the distribution by your orator of said natural gas for fuel and heating purposes, and that everything done by your orator in the way of enlarging, relaying, replacing, putting down, extending, changing and improving

said pipes, and mains, plants, feeders and appliances has been so done by your orator under the power and authority contained in its charter and franchise, and all in pursuance of the general plan and project of your orator to extend, enlarge, improve and better its system of mains, and more fully to carry out and perform the purpose and object for which it was incorporated by the State of Illinois, and being generally to furnish and supply the entire city of Chicago and all the inhabitants thereof with gas, all of which has been done by your orator in reliance upon its charter powers and the consent of the city of Chicago and in reliance upon the recognition of and acquiescence by the city of Chicago in the acquisition and operation by your orator of the plant and property so as aforesaid by your orator acquired from the corporations aforesaid, and in reliance upon the large sum of money paid by your orator to the city of Chicago under said agreement, dated July 20, 1899; and your orator further charges that in order to enable your orator to
115 comply with the duties and obligations on your orator by its charter imposed, and in extending and enlarging said mains and system, your orator has been obliged to rebuild and enlarge all of the manufacturing plants so as aforesaid acquired by your orator from the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Chicago Economic Fuel Gas Company, the Illinois Light, Heat and Power Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company, and has acquired additional real estate and built and constructed additional buildings thereon, and installed in the buildings so erected, and in the buildings acquired as aforesaid, new and improved machinery and appliances for the production of gas, and generally your orator has substantially rebuilt all of said plants and relaid or replaced substantially all of the gas pipes and gas mains in the city of Chicago acquired by your orator from said Chicago Gas Light and Fuel Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Chicago Economic Fuel Gas Company, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company, and has expended in doing said work, and in extending, enlarging, repairing and connecting its system of pipes, mains, services and feeders, upwards of five millions of dollars; and your orator insists that it would be inequitable and unjust to permit the city of Chicago to now claim that it has never given its consent to the acquisition of such property by your orator, and the operation thereof under the powers and privileges in and by the charter of your orator granted to it, if such consent should be held to be material, and your orator insists that the city of Chicago is now estopped to set up any such claim or pretense.

Your orator further shows unto your honors that at the
116 time of the acquisition and taking over by your orator of said plants, pipes, mains and property from said other gas companies as aforesaid, said companies were indebted upon legal

obligations of said companies, severally, all of which obligations were secured by mortgages or deeds of trust upon the property, severally, of said companies, executed and delivered by said companies, severally. That the amounts of said indebtedness as aforesaid, secured by mortgage or deed of trust in every case, were as follows:

First-mortgage five per cent. bonds of the Chicago Gas Light and Coke Company, dated July 1, 1887, and due July 1 1937, $10,000,000.

First-mortgage six per cent. bonds of the Equitable Gas Light and Fuel Company of Chicago, dated 1885, and due July 1, 1905, $2,000,000.

First-mortgage five per cent. bonds of the Consumers' Gas Company, dated December 1, 1886, and due December 1, 1936, $4,246,000.

First-mortgage seven per cent. bonds of the Illinois Light, Heat and Power Company, dated November 18, 1885, and due November 1, 1915, $500,000.

First-mortgage six per cent. bonds of the Lake Gas Company, dated July 1, 1885, and due July 1, 1915, $300,000.

First-mortgage five per cent. bonds of the Chicago Economic Fuel Gas Company, dated January 2, 1893, and due January 1, 1916, $2,500,000.

Thereafter, and on or about the first day of September, 1897, your orator executed and delivered its mortgage or deed of trust to the Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, as trustee, called its refunding mortgage, to secure its refunding five per cent. gold bonds, amounting in the aggregate to the sum of $40,000,000, issued and to be issued, of which amount $29,046,000 of bonds were reserved to take up the bonds theretofore issued by said Chicago Gas Light and Coke Company, the Equitable Gas Light and
117 Fuel Company, the Consumers' Gas Company, the Illinois Light, Heat and Power Company, the Lake Gas Company, the Chicago Economic Fuel Gas Company, as aforesaid, and certain other bonds theretofore issued by your orator, then outstanding, aggregating $9,500,000, as follows:

First-mortgage six per cent. bonds of your orator, dated November 9, 1874, and due November 1, 1904, aggregating $2,100,000;

Second-mortgage six per cent. bonds of your orator, dated December 5, 1874, and due December 1, 1904, aggregating $2,500,000;

First consolidated six per cent. bonds of your orator, dated April 1, 1893, and due April 1, 1943, aggregating $4,900,000.

That to secure said issue of bonds, your orator executed and delivered its mortgage or deed of trust, as aforesaid, and conveyed all and singular its property, of every kind and nature, including as well the plants, machinery, pipes, mains, feeders and appliances so as aforesaid acquired by your orator from said other gas companies. A copy of said mortgage, and of the bonds secured thereby, is hereby referred to with like effect as if herein set out at length.

And your orator charges the fact to be that after the execution and delivery of said refunding mortgage aforesaid, your orator issued, pursuant to the terms of said instrument, $2,500,000 of bonds secured

thereby, for the purpose of taking up and retiring the $2,500,000 of first-mortgage five per cent. bonds of the Chicago Economic Fuel Gas Company, dated January 2, 1893, above mentioned, and your orator charges the fact to be that said refunding mortgage, shortly after its execution and delivery, and before the issuance of any bonds thereunder, was filed for record in the office of the recorder of deeds of Cook county, Illinois.

Your orator further shows unto your honors, and charges the fact to be that in issuing said refunding mortgage, and to raise
118 money for the purpose of extending, enlarging, improving and bettering its system of plants, mains, pipes, feeders and appliances, and for the purpose of construction, maintenance, repair, reconstruction and operation of its various lines of pipes, mains, feeders and appliances, and for the purpose of taking up and retiring the bonds issued by the companies, the property of which companies was so as aforesaid by your orator acquired, your orator relied upon the contract in its charter contained, between your orator and the People of the State of Illinois, that the common council of the city of Chicago should in no case be authorized to compel your orator to furnish gas at a less rate than $3 per thousand cubic feet; that, as above set out, many of said outstanding bonds will be due and payable within the next two years, and it will be necessary for your orator to borrow money upon the faith of said refunding bonds to assist in the payment and retirement of said bonds aforesaid as they mature; that by the mortgages securing all of said outstanding bonds, all the property, rights, privileges and franchises of the companies issuing said bonds, including the contract rights created in and by the charter of your orator as aforesaid, together with all the income, issues, and profits arising therefrom, have been mortgaged to trustees therein named, for the use and benefit and security of the holders of such bonds; that said bonds have been sold to parties purchasing the same in the full faith and belief that the city of Chicago was prohibited by said charter from compelling your orator to furnish gas at a less than $3 rate per thousand cubic feet; that said provision in said charter is a right of property, and the action of the city council of the city of Chicago, in passing the ordinance hereinafter set out, is an impairment of the obligation of said contract as against the rights of the holders of said bonds, under and by virtue of the security created by said various mortgages or deeds of trust.

119 XXIX.

Your orator further shows that, notwithstanding the privileges and powers conferred upon your orator by its charter, as aforesaid, and notwithstanding the agreement contained in said charter, that the common council of the city of Chicago should in no case be authorized to compel your orator to furnish gas at a net rate less than three dollars per thousand feet, and notwithstanding the contract thereby existing by and between your orator and the People of the State of Illinois, the said common council of the city of Chicago, as representing said city, did, recently, arbitrarily, unlawfully and un-

warrantably, claiming that it had the power to regulate the price of gas sold and distributed by your orator to the city of Chicago and to residents thereof, and without investigation or judicial proceedings of any kind, and without giving or permitting a hearing of any sort to your orator, on or about the 15th day of October, 1900, pass a certain ordinance, which said ordinance is in the words and figures following, to wit:

"*Be it ordained by the city council of the city of Chicago:*

SEC. 1. That no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used. Said sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas shall be the net price charged, exacted, demanded or collected from each consumer. Manufactured gas so furnished shall afford a light of not less than twenty (20) candle power, to be measured and ascertained at the place of consumption in said city by the most modern appliances known to science for measuring the candle-power of illuminating gas.

Provided, however, That any corporation, company or companies, firm or person distributing or selling gas for fuel or illuminating purposes in the city of Chicago may, in addition to said seventy-five (75) cents per one thousand cubic feet of gas furnished to such consumer, add a penalty of not exceeding ten (10) cents for each one thousand (1,000) cubic feet of gas so supplied to such consumer for delinquency or non-payment of the bill, statement or charge of said corporation, company or companies, firm or person after ten days from the date at which said bill, statement or charge is made and furnished to such consumer.

SEC. 2. That any company, corporation, person or persons who shall remove any meter or meters from the house, store, factory or premises of any consumer of gas in the city of Chicago, against the will and consent of any such consumer of gas who is willing to pay for gas furnished him, it or them by any such company, corporation, person or persons, and tenders the amount due at the price established and fixed in section 1 of this ordinance, shall be subject to a penalty of not less than twenty-five (25) nor more than two hundred ($200) dollars for each and every offense; *Provided, however*, That any company, corporation, person or persons furnishing gas to consumers in the city of Chicago shall have the right to remove any meter or meters for the purpose of repairing the same, on condition that such meter or meters so removed shall be replaced or a new one substituted in its place within twenty-four (24) hours of the time of the removal of any such meter or meters.

SEC. 3. That any company, corporation, person or persons who shall, in violation of the provisions of the preceding sections, charge or require the city of Chicago, or any citizen thereof, or any consumer of gas therein, to pay for gas furnished to it or them, or either of them, a sum in excess of seventy-five (75) cents per thousand cubic

feet, or who shall furnish to the said city of Chicago, or any citizen thereof, manufactured gas less than twenty (20) candle power shall be subject to a penalty of not less than twenty-five dollars ($25), nor more than two hundred dollars ($200) for each and every offense.

SEC. 4. This ordinance shall be in full force and effect from and after the 2d day of January, A. D. 1901; *Provided*, That said ordinance shall not go into effect until it has been duly published, as provided by law."

121 XXX.

Your orator further shows that the said ordinance was not afterwards vetoed, repealed, modified or amended, and remains in full force and effect as the enactment of the common council of the city of Chicago, and of the city of Chicago. And your orator charges that the said defendant, The City of Chicago, claims that under and by virtue of the provisions of the charter of your orator and under and by virtue of the general police powers claimed by the city of Chicago to have been granted to it by the State of Illinois, the city of Chicago has the right and power to regulate and fix the price at which gas shall hereafter be furnished by your orator to the citizens of the city of Chicago and to the city of Chicago, and that the said city of Chicago so claims the said right regardless of the privileges and powers conferred upon your orator by its charter from the State of Illinois, and of the contract therein embodied by and between your orator and the People of the State of Illinois, and regardless of the inhibition in said charter contained, prohibiting the city of Chicago from compelling your orator to furnish gas at a less rate than three dollars per thousand cubic feet.

Your orator further shows that the city of Chicago announces, and has threatened, that it will forthwith proceed to enforce the said ordinance against your orator in the event of any violation of the terms thereof by your orator; and your orator further shows that it has been advised by sundry citizens of the city of Chicago that in the event of the failure of your orator to comply with the terms of said ordinance so passed by the said city of Chicago as aforesaid, they will immediately take steps, by means of prosecution in the courts of the State of Illinois, to enforce against your orator
122 the penalties denounced in said ordinance upon a refusal by your orator to comply with the terms of said ordinance, in respect to the price charged by your orator for gas, as aforesaid.

XXXI.

Your orator further shows that it has now upwards of three hundred thousand customers in the city of Chicago, in addition to the city of Chicago itself, to which your orator is daily selling and distributing gas, and that during the years 1900 and 1901 your orator sold and delivered to such customers, at the rates specified, an enormous amount of gas in each year, aggregating many hundred million cubic feet in each year, and that on the date of the passage of said ordinance your orator was engaged in selling illuminating gas to such customers, including the city of Chicago, at the net rate of one

dollar per thousand cubic feet, which said net rate of one dollar per thousand cubic feet your orator had fixed as the price of its illuminating gas sold and delivered in the city of Chicago, and which said rate so fixed by your orator had been charged by your orator in the city of Chicago for upwards of four years last past, and which rate, in the judgment of your orator, was a just, fair and proper rate for your orator to charge for its illuminating gas as aforesaid.

And your orator further shows that many of its said consumers are people of small means and are financially irresponsible; that your orator renders to each of its customers monthly statements for the gas consumed by each of said customers during the preceding month, and collects therefor within a short time thereafter; that unless said bills are promptly paid your orator, as is its right and privilege, discontinues the supply of gas to such customers, and that such is the only method by which your orator is enabled to
123 avoid great loss, by reason of the failure or inability of many of the customers and consumers of your orator to pay the bills for the gas consumed by them; and in this connection your orator shows and charges the fact to be that if the city of Chicago should be permitted to begin prosecutions against your orator for the failure of your orator to comply with the terms of said ordinance, that thereupon a large number of customers and consumers of your orator would decline to pay your orator the price fixed by it as aforesaid, and being the net rate of one dollar per thousand cubic feet, and would refuse to pay any sum or sums whatsoever to your orator over and above the sum fixed by the city of Chicago in said ordinance; and that if your orator should attempt to remove the meters in the houses of such customers or should attempt to discontinue the supply of gas to such customers, your orator would be immediately subjected to prosecutions and arrests on the part of the city of Chicago; that, if, on the other hand, your orator should permit the bills of said customers to run until the final determination of such suit or suits as the city of Chicago might bring against your orator for failure on the part of your orator to comply with the terms of the ordinance aforesaid, the outstanding bills of your orator would aggregate an enormous amount, which your orator is at present unable to calculate, and which it is impossible to calculate by any means whatsoever; and your orator shows that by means thereof and by reason of the financial irresponsibility of a large number of your orator's customers and consumers, your orator would be unable, in the event that it finally succeeded in defeating the prosecution or prosecutions brought against it by the city of Chicago, to collect from such customers and consumers the amount of such outstanding indebtedness; and thereby your orator shows unto the court and charges the fact to be that your orator would suffer enormous loss, the exact amount of which your orator is unable to calculate, and which your
124 orator says it is impossible to calculate in any respect whatsoever, but which, in the opinion of your orator, would amount to many hundreds of thousands of dollars, and that the damage to your orator would be irreparable and incalculable.

XXXII.

Your orator further shows and states the fact to be, that if your orator should fail to comply with the terms of said ordinance, and should decline to furnish gas at the rate fixed therefor in said ordinance, but, on the contrary should continue to demand of its customers the rate which your orator has fixed as being the just, fair and proper rate for your orator to charge to said customers, that is to say, should continue to charge said customers $1 net per thousand cubic feet for gas sold and distributed to them, that then, under and by virtue of the terms of said ordinance, any customer of your orator in the city of Chicago could begin a prosecution against your orator for a violation of the terms and conditions of said ordinance; and your orator charges the fact to be that in the event of the failure of your orator to comply with the terms and conditions of said ordinance, many thousands of such suits will be started by the customers of your orator in the city of Chicago, in addition to such suits as the city of Chicago may see fit to start in attempting to enforce the provisions of said ordinance: and your orator shows unto the court that thereby, and by means thereof, your orator would be subjected to a multiplicity of suits; that it would be subjected to enormous expense in defending the same; that by reason thereof your orator would be unable to attend to its ordinary and legitimate business and affairs, pursuant to the privileges and powers conferred upon it in and by its charter from the People of the State of Illinois, and that the litigation arising therefrom would be endless, and
125 the suits arising therefrom would be numberless. And your orator charges the fact to be that in the event of the failure of your orator to comply with the terms and conditions of said ordinance, the said city of Chicago will attempt to enforce the provisions of said ordinance, and to compel your orator to comply therewith. And your orator further charges that in pursuance of such efforts on the part of said city of Chicago to compel your orator to comply with the terms and conditions of said ordinance, said city of Chicago will begin, or cause to be begun, an enormous number of such suits, and will thereby harass and disturb your orator in the pursuit of its business aforesaid, and will make it impossible for your orator to conduct its business aforesaid in said city of Chicago because thereof. And your orator charges that it is unable to state the exact amount your orator would lose from even the temporary enforcement of said ordinance by the city of Chicago, but your orator charges it would be very largely in excess of two thousand dollars.

XXXIII.

And your orator further shows that the powers and privileges conferred upon your orator by the said charter to fix the rates for gas sold and distributed by your orator is a property right, and, as such, is protected by the Constitution of the United States and the laws thereof, and the provisions of said charter, wherein and whereby it is agreed by and between the People of the State of Illinois and your orator that the common council of the city of Chicago shall in

no case be authorized to compel your orator to furnish gas at a less rate than three dollears per thousand feet, is likewise a property right, and, as such, protected by the Constitution of the United States and the laws thereof.

126 XXXIV.

Your orator further shows that the passage of said ordinance and the enforcement thereof by the common council of the city of Chicago is and will be an attempt on the part of the said city of Chicago to reduce the price of gas manufactured, sold and distributed by your orator in and throughout the city of Chicago, in violation of the contract between your orator and the People of the State of Illinois, contained in its charter of incorporation, as hereinbefore set forth; and is a violation of the rights of your orator as guaranteed by the first clause of section 10 of article 1 of the Constitution of the United States of America, wherein and whereby it is provided that no State shall pass any law impairing the obligation of contracts; that it is a further violation of the rights of your orator as guaranteed to it by the fourteenth amendment to the Constitution of the United States of America, wherein and whereby it is provided that no State shall deprive any person of life, liberty or property without due process of law; and that the passage of said ordinance, and the enforcement thereof, by the city of Chicago is a further violation of the rights of your orator as guaranteed to it by the Constitution of the United States of America, and all amendments thereto, all of which constitutional guarantees this complainant invokes and relies upon.

Forasmuch, therefore, as your orator is without remedy save in a court of equity, where matters of this sort are properly cognizable and relievable, and to the end that the contract rights of your orator under its charter as aforesaid may be preserved, your orator prays that the City of Chicago may be made party defendant to this your orator's bill of complaint, and may be required to make full, true and direct answer to the same by a day certain to be fixed
127 by the court, but not under oath, the answer of said defendant under oath being expressly waived; that upon final hearing hereof the said ordinance so passed by the city council of the city of Chicago on the fifteenth day of October, 1900, entitled "An ordinance regulating and fixing the price of gas in the city of Chicago," may be adjudged and decreed to be inoperative, invalid, illegal, null and void, and of no force and effect as against the People's Gas Light and Coke Company, and in violation of the contract rights of your orator contained in its charter as aforesaid, and that it may be adjudged and decreed that by said charter of the People's Gas Light and Coke Company the People of the State of Illinois agreed with the People's Gas Light and Coke Company that the common council of the city of Chicago should never be authorized to compel the People's Gas Light and Coke Company to furnish gas at a less rate than three dollars per thousand cubic feet, and that such contract is a valuable property right of the said People's Gas Light and Coke Company.

That upon the filing of this amended bill of complaint a tempo-

rary restraining order may forthwith issue against the said defendant, The City of Chicago, restraining and enjoining the City of Chicago, its mayor, chief of police, city attorney, corporation counsel, and all other its officers, agents, servants and employés, and each, every and all of them, until the further order of the court, from in any way enforcing or attempting to enforce said ordinance adopted on October 15 1900, entitled "An ordinance regulating and fixing the price of gas in the city of Chicago," or any of the provisions thereof, against the People's Gas Light and Coke Company, or from in anywise interfering with the People's Gas Light and Coke Company or with the property or business of said People's Gas Light and Coke Company by the commencement of actions or otherwise,
128 founded upon said ordinance of October 15, 1900, until the further order of the court herein, and that upon final hearing hereof the said injunction be made perpetual; and that if at any time hereafter, and prior to the final hearing of said cause, any resident or residents, citizens or citizen, of the city of Chicago, consumers of gas or otherwise furnished by the People's Gas Light and Coke Company, shall enforce or attempt to enforce said ordinance passed by the city council of the city of Chicago on October 15th, 1900, or begin any prosecution thereunder in any of the courts of the State of Illinois, or take any steps or other proceedings thereunder, your orator may have leave forthwith to make such persons parties defendant to this your orator's bill of complaint, and that said persons and each of them may forthwith be enjoined and restrained as heretofore and herein prayed for by your orator in this bill of complaint, and that upon final hearing the injunction against such person or persons may be made perpetual. And that your orator may have such other or further or different relief in the premises as the nature of the case may require.

And may it please your honors to grant unto your orator the People's writ of injunction, to be directed to the said City of Chicago, its mayor, chief of police, city attorney, corporation counsel, and all others, its officers, agents, servants and employés, restraining them and each of them as by your orator is heretofore and herein prayed.

And may it please your honors to grant the writ of summons in chancery, directed to the marshal of the northern district of the State of Illinois, northern division thereof, commanding him that he summon said defendant, The City of Chicago, to appear before this honorable court by a day certain to be fixed by the court, and then and there to answer this your orator's amended bill of complaint.

129 And your orator will ever pray, etc.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
By SEARS, MEAGHER & WHITNEY,
Its Solicitors.

JOHN W. GRIGGS,
W. F. SHEEHAN,
JAMES F. MEAGHER,
THOMAS A. MORAN,
Of Counsel.

STATE OF ILLINOIS, } ss:
County of Cook, }

C. K. Wooster, being first duly sworn, on oath deposes and says that he is the vice-president of the People's Gas Light and Coke Company; that he has read the foregoing bill of complaint, and that the matters and things therein set forth are true of his own knowledge.

C. K. WOOSTER.

Subscribed and sworn to before me this fourth day of June, A. D. 1902.

[SEAL.] FRED L. BLACKINTON,
Notary Public.

(Endorsed:) Filed June 5, 1902, as of Jan'y 15, 1902 Marshall E. Sampsell, clerk.

130 And on to wit: the 6th day of June, 1902, came the City of Chicago by its solicitors Granville W. Browning and Charles M. Walker, corporation counsel, and filed in the clerk's office of said court in said entitled cause its certain demurrer to the amended bill in words and figures following to wit:

Demurrer to Amended Bill.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY }
vs.
THE CITY OF CHICAGO. }

The demurrer of the defendant, The City of Chicago, to the complainant's amended bill of complaint.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's amended bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, does demur to the said amended bill, and for cause of demurrer, shows that the said complainant has not in and by its said amended bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Therefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur
131 thereto, and prays the judgment of this honorable court, whether it shall be compelled to make any further or other answer to the said amended bill; and it humbly prays to be hence

dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GRANVILLE W. BROWNING,
Solicitor of the City of Chicago.

CHARLES M. WALKER,
Corporation Counsel.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
THE CITY OF CHICAGO.

I, Granville W. Browning, do hereby certify that I am the solicitor of record of the defendant, The City of Chicago, in the above-entitled cause, and do further certify that the foregoing demurrer to complainant's amended bill of complaint is well founded in point of law.

GRANVILLE W. BROWNING.

132 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
THE CITY OF CHICAGO.

Granville W. Browning, being first duly sworn, deposes and says that he represents The City of Chicago, defendant in the above-entitled cause, and that the foregoing demurrer of the said defendant is not interposed for delay.

GRANVILLE W. BROWNING.

Subscribed and sworn to before me, this 5th day of June, A. D. 1902.

VIRGINIA GUEST,
[SEAL.] *Notary Public.*

(Endorsed:) Filed June 6, 1902. Marshall E. Sampsell, clerk.

133 And on to wit: the 30th day of July, 1902, there was filed in the clerk's office of said court in said entitled cause a certain opinion in words and figures following to wit:

Opinion.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO.

I have considered with great care the arguments, both oral and printed, submitted on the rehearing, and see nothing that ought to change the opinion already filed, or the order that followed.

The only serious question is whether, in view of the recent decision of the Supreme Court of the United States, in the Detroit traction case, the gas consolidation act of 1898 is to be held to embody a contract between the State and the complainant whereby, from that time forth gas was to be furnished by the complainant at a fixed rate unalterable by either party without the consent of the other. The language of the section relied on is as follows: "Such corporation (the consolidated corporation) shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger." It is averred that such price for the "year immediately preceding" was not less than one dollar per thousand.

If this rate thus named in the act was meant as a maximum rate only, the Detroit case does not apply; if it was meant however, as an agreed fixed rate unalterable by either party, the decision does apply.

134 The Detroit case announced no new law. It is fundamental that no city or State can constitutionally enact any legislation that impairs the validity of existing contracts. The Detroit case merely held that under the legislation of Michigan the ordinance rate named, though in words a maximum rate only, must be regarded as an agreed fixed rate. The decision does not modify the previous decisions in the Illinois water cases where similar language in water ordinances *are* construed as maximum rates only. The question involved therefore, is not so much a question of constitutional law as a question of interpretation; namely, what was the legislative intent in the enactment of the gas consolidation act of 1898.

The act was not special—applying to complainant only. It applies to every gas company and to every city in the State. It contains no mandate, as in the Detroit case, that there shall be an agreed constant rate. It is preceded by no legislation looking to such constant rate. Its language, therefore, must be given its plain ordinary significance; and so construed I can see in it no purpose other than to fix, not a rate unalterable by either party, but a rate beyond which the consolidated companies may not go. To give it any other interpretation would be to import into the act a strained and artificial meaning.

I agree with counsel that neither city nor State must be allowed to run over plain contract rights. Against attempts of that kind the courts have always stood as a wall of defense. But it is equally important that no just right of the State should be impaired, nor a meaning put into its legislation that was not intended. When it comes to ascertaining what are the boundaries of the powers of the State, the courts must not forget that there are boundaries to their own powers as well.

The demurrer to the amended bill will be sustained and the bill dismissed for want of jurisdiction in this court over the cause of action set forth.

P. S. GROSSCUP,
Circuit Judge.

(Endorsed:) Filed July 30, 1902. Marshall E. Sampsell, clerk.

135 And on to wit: the 30th day of July, being one of the days of the regular July term of said court, 1902, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, by the direction of the Hon. Peter S. Grosscup, circuit judge, appears the following entry to wit:

Order of July 30, 1902, Sustaining Demurrer to Bill of Complaint as Amended.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO. } 25780.

This matter coming on to be heard upon demurrer of the defendant to the amended bill of complaint herein, the court having heard argument of counsel, and being fully advised in the premises,

It is hereby ordered, adjudged and decreed, that said demurrer be and the same is hereby sustained; that said amended bill be and the same is hereby dismissed for want of jurisdiction at the cost of complainant, and that defendant have execution for said costs.

And thereupon the complainant enters its motion herein for an appeal to the Supreme Court of the United States, which is allowed, and the court fixes the amount of the appeal bond at the sum of six hundred thousand dollars to be filed within sixty days, which bond, when so filed and approved shall operate as a supersedeas.

And by agreement of the parties in open court it is stipulated by counsel for the defendant that pending said period of sixty days from this date the former restraining order entered herein on January 2, 1901, remain in force.

136 And afterwards, to wit: on the fifteenth day of September, A. D. 1902, the complainant, by its solicitors filed in said cause its petition for appeal to the Supreme Court of the United

States with its assignment of errors and appeal bond, respectively in words and figures following, to wit:—

137 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY, Complainant,
versus
CITY OF CHICAGO, Defendant.

The above-named complainant, The People's Gas Light and Coke Company, conceiving itself aggrieved by the order and decree made and entered in the above-named court in the above-entitled cause under date of July 30th, 1902, wherein and whereby, among other things, it was and is ordered and directed that the bill of complaint of the said complainant be dismissed for want of jurisdiction, does hereby appeal to the Supreme Court of the United States from said order and decree, for the reasons set forth in the assignment of errors which is filed herewith; and it prays that this its petition for its said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated September 12th, 1902.

SEARS, MEAGHER & WHITNEY,
Solicitors for The People's Gas Light and Coke Company, Complainant.

138 The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Done this 15 day of Sep. 1902.

KOHLSAAT, *Judge.*

(Endorsed:) Filed Sep. 15, 1902, Marshall E. Sampsell, clerk.

139 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY, Complainant,
vs.
CITY OF CHICAGO, Respondent.

Comes now the complainant and files the following assignment of errors, upon which it will rely its appeal from the decree made by this honorable court on the thirtieth day of July, 1902, in the above-entitled cause:

1. The United States circuit court, in and for the northern district of Illinois, northern division, erred in dismissing the complainant's amended bill of complaint in the above-entitled cause.

2. The court erred in dismissing said suit, and entering a final

decree therein in favor of the said City of Chicago, for its costs against said The People's Gas Light and Coke Company.

3. The court erred in dismissing the complainant's amended bill of complaint, in manner and form as shown by the record of said suit and proceedings.

4. The court erred in refusing to grant to complainant the relief asked and prayed for in and by said complainant's amended bill of complaint.

140 5. The court erred in refusing to enter a decree in favor of complainant, in accordance with the prayer of the amended bill of complaint.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the court, and prays that such disposition be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided, and complainant prays a reversal of the decree of dismissal made and entered by said court, in said cause.

SEARS, MEAGHER & WHITNEY,
Solicitors for the People's Gas Light and Coke Company.

(Endorsed:) Filed Sep. 15, 1902, Marshall E. Sampsell, clerk.

141 *Know all men by these presents*, that we, The People's Gas Light and Coke Company, a corporation organized and existing under the laws of the State of Illinois, as principal, and Pacific Surety Company, of California, a corporation organized and existing under the laws of the State of California, and authorized to act as surety by the laws of the State of Illinois, as surety, are held and firmly bound unto the City of Chicago, in the full and just sum of six hundred thousand dollars ($600,000), lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, and our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this tenth day of September, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at a session of the circuit court of the United States, for the northern district of Illinois, northern division, in a suit pending in said court, between The People's Gas Light and Coke Company, complainant, and The City of Chicago, defendant, a decree was rendered dismissing the bill of complaint filed in said suit, for want of jurisdiction, and the said The People's Gas Light and Coke Company having obtained from said court an order allowing an appeal to the Supreme Court of the United States, to reverse the decree so rendered in the aforesaid suit; and a citation directed to the said City of Chicago is about to be issued, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty (30) days from the date hereof.

Now, the condition of the above obligation is such, that if the said The People's Gas Light and Coke Company shall prosecute its said appeal to effect, and answer all damages and costs that may be

awarded against it, if it fails to make its plea good, then the
142 above obligation to be void; else to remain in full force and virtue.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
[SEAL.] By GEO. O. KNAPP, *Its President.*

Attest: L. A. WILEY, *Secretary.*

PACIFIC SURETY COMPANY OF CALIFORNIA,
[SEAL.] By STUART G. SHEPARD,
Resident Assistant Secretary.

Attest: ALLAN C. DURBOROW,
General Agent.

Approved: Sep. 15, 1902,

KOHLSAAT, *Judge.*

O K.
GRANVILLE W. BROWNING,
Sol'r of the City of Chicago.

O K.
MARSHALL E. SAMPSELL, *Clerk.*

(Endorsed:) Filed Sep. 15, 1902, Marshall E. Sampsell, clerk.

143 And on the same day, to wit: September 15, A. D. 1902, being one of the days of the regular July term of said court, 1902, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the order allowing said appeal, as follows, to wit:

144 *Order.*

Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *September* 15, 1902.

Present: Hon. Christian C. Kohlsaat, district judge.

THE PEOPLE'S GAS LIGHT & COKE COMPANY
vs. } 25780.
THE CITY OF CHICAGO, ETC.

Now comes the complainant, by its solicitor, and files its petition for appeal to the Supreme Court of the United States, together with its assignments of error, and its appeal bond in the penalty of six hundred thousand dollars ($600,000.00) with the Pacific Surety Company of California as surety, and the complainant having now complied with the rules of said court and the order entered herein on July 30, 1902,

It is thereupon ordered that said appeal be and the same is hereby allowed to the Supreme Court of the United States and that a transcript of the record herein be transmitted to the clerk of said court within thirty days.

145 NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, Marshall E. Sampsell, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court and made in accordance with præcipe filed in the cause entitled The People's Gas Light and Coke Company, complainant, vs. City of Chicago, as the same appear from the original records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district this 20th day of September A. D. 1902.

MARSHALL E. SAMPSELL, *Clerk.*

146 UNITED STATES OF AMERICA, ss:

To the City of Chicago, Carter H. Harrison, mayor of the city of Chicago; Charles M. Walker, corporation counsel to the city of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States, for the northern district of Illinois, northern division, wherein The People's Gas Light and Coke Company is complainant and appellant, and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said complainant and appellant, as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Christian C. Kohlsaat, judge of the United States district court, in and for the northern district of Illinois, this 15th day of September, in the year of our Lord one thousand nine hundred and two.

KOHLSAAT, *Judge.*

Filed Sep. 20 1902.

MARSHALL E. SAMPSELL, *Clerk.*

Service accepted for the City of Chicago.

GRANVILLE W. BROWNING,
Sol. for the City of Chicago.

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, } ss:

I hereby certify that I served the within citation on Granville W. Browning of the city of Chicago, Illinois, on the 17 day of September, 1902, at the city of Chicago, county of Cook, in the State of Illinois, by then and there delivering to the said Granville W. Browning, personally, a true copy of the within citation, which was done by order of att'y for appellant.

Dated at Chicago, in the State of Illinois, this 17th day of September, 1902.

One service	2.00
" mile	6
	$2.06

JOHN C. AMES,
United States Marshall,
By A. A. BACH, *Deputy.*

147 [Endorsed:] 2517. 25780. Supreme Court of the United States. The People's Gas Light and Coke Company *versus* City of Chicago. Citation to the Supreme Court of the United States.

Endorsed on cover: File No. 18,672. N. Illinois C. C. U. S. Term No. 444. The People's Gas Light and Coke Company, appellant, *vs.* The City of Chicago. Filed September 25", 1902.

Supreme Court of the United States, October Term, 1903.

THE PEOPLES GAS LIGHT AND COKE CO., Appellant,
vs.
THE CITY OF CHICAGO.
No. 132.

Mr. Francis J. Kearful, in behalf of counsel for the appellant, submitted to the consideration of the court a motion for a writ of certiorari and a stipulation of counsel in relation thereto. Whereupon, it is now here ordered by the court that said motion be, and the same is hereby, granted, and that the certified transcript presented with said motion and stipulation be taken and filed as a return to the writ of certiorari, December 9, 1903.

(18672.)

Supreme Court of the United States, October Term, A. D. 1903.

THE PEOPLES GAS LIGHT AND COKE COMPANY, Appellant,
vs.
THE CITY OF CHICAGO, Appellee.
No. 132.

The appellee in the above entitled cause hereby acknowledges due service of notice of the presentation to this honorable court of the petition for certiorari hereto attached; admits the making of the stipulation of December 5, 1903, and the entry of the order on said date *nunc pro tunc* as of July 30, 1902, all as in said petition for certiorari set forth; and consents that said petition for certiorari may be granted by this honorable court, or, if this honorable court shall deny said petition for certiorari, the appellee consents that the record in the above entitled cause may be amended, on motion of appellant, and without further notice to appellee, so as to correct the decree of July 30, 1902, and the opinion of the circuit court of the United States, for the northern district of Illinois, in accordance with the terms and provisions of the stipulation of December 5, 1903, aforesaid: the intent and meaning of this consent being that said petition for certiorari may be granted by this honorable court, or that the record in the above entitled cause may be amended, so as to correct the decree and opinion aforesaid, in accordance with the terms and provisions of said stipulation.

Chicago, December 7, 1903.

WILLIAM D. GUTHRIE,
Of Counsel for the People's Gas Light and Coke Company.

———, ———,
Corporation Counsel for the City of Chicago.
GRANVILLE W. BROWNING,
Solicitor for the City of Chicago.

EDGAR B. TOLMAN,
Corporation Counsel, of Counsel.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

THE PEOPLES GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO. } 25780.

To the clerk of the above-entitled court:

You will please prepare supplemental transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States under the appeal heretofore perfected to said court, and include in the said transcript the following pleadings, proceedings and papers on file, to wit:

Stipulation of December 5th, 1903;

Order of December 5th, 1903, *nunc pro tunc* as of July 30th, 1903.

Said supplemental transcript to be prepared as required by law and the rules of this court, and the rules of the Supreme Court of the United States, and on file in the office of the clerk of the said Supreme Court of the United States at Washington, forthwith.

SEARS, MEAGHER AND WHITNEY,
Solicitors for Appellant.

Dated Chicago, December 5th, 1903.

Placita.

Pleas in the circuit court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court room, in the city of Chicago, in said district, before the Honorable Peter S. Grosscup, judge of said court, on Thursday, the 30th day of July, in the year of our Lord, one thousand nine hundred and three, being one of the days of the regular July term of said court, of the year last aforesaid, and of our Independence the *the* one hundred and twenty-eighth year.

MARSHALL E. SAMPSELL, *Clerk.*

THE PEOPLES GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO. } Gen. No. 25780.

Be it remembered that on this day, to-wit, the 5th day of December, A. D. 1903, there was filed in the office of the clerk of said court a stipulation in writing in the following words and figures, to-wit:

United States Circuit Court for the Northern District of Illinois, Northern Division.

THE PEOPLES GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO.
No. 25780.

It is hereby stipulated and agreed by and between the parties in the above entitled suit that the decree heretofore entered in the above entitled suit on or about the thirtieth day of July, 1902, in the absence of the Honorable Peter S. Grosscup, circuit judge, before whom the case was heard and argued, and which decree does not correctly recite the judgment as intended by the court, be amended *nunc pro tunc* as of said July 30th, 1902, so as to strike therefrom, after the word "dismissed," the words "for want of jurisdiction," and to insert in lieu thereof the words "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois;" that an order or decree so amending and correcting said decree be forthwith entered without prejudice to any of the proceedings heretofore had or to the appeal from said decree of July 30th, 1902, now pending in the Supreme Court of the United States, and that such proceedings be had in said Supreme Court as shall effectuate the amendment of said decree *nunc pro tunc* as fully to all intents and purposes as if contained in the original record now in said Supreme Court, so that the appeal may be heard and decided on the decree as now amended *nunc pro tunc*.

It is also hereby stipulated and agreed that the opinion of the court on rehearing be likewise amended *nunc pro tunc*, so as to omit therefrom, after the word "dismissed" the words "for want of jurisdiction in this court over the cause of action set forth," and to insert in lieu thereof the words, "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois," and that an order be entered amending the record accordingly.

Chicago, December 5, 1903.

SEARS, MEAGHER & WHITNEY,
Solicitor for Peoples Gas Light & Coke Company.
GRANVILLE W. BROWNING,
Solicitor for the Defendant, The City of Chicago.

(Endorsed:) Filed Dec. 5, 1903. Marshall E. Sampsell, clerk.

Afterwards on the same day and year, to-wit, the 5th day of December, A. D. 1903, being one of the days of the regular July term of said court, in the record of proceedings thereof, in the above en-

titled cause, before the Hon. Peter S. Grosscup, circuit judge, appears the following entry, to-wit:—

THE PEOPLE'S GAS LIGHT AND COKE COMPANY
vs.
CITY OF CHICAGO. } Gen. No. 25780.

On reading and filing the annexed consent and stipulation to the entry of this order, which is hereby made a part hereof, it is

Ordered and decreed that the final order and decree heretofore entered July 30, 1902, in the above entitled suit now pending on appeal to the Supreme Court of the United States, be and the same hereby is amended *nunc pro tunc* as of said July 30, 1902, so as to state the true decision of the court by striking therefrom after the word, "dismissed," the words, "for want of jurisdiction," and inserting in lieu thereof the words "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois" and that the record on appeal be and the same hereby is amended accordingly, so that said appeal may be heard and decided on the decree as now amended *nunc pro tunc*.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division*, } *ss:*

I, Marshall E. Sampsell, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be true and complete copies of stipulation filed on the 5th day of December, A. D. 1903, and the order entered of record in said court on said last above mentioned date, amending the final order and decree heretofore entered on the 30th day of July, A. D. 1903. And I further certify that said stipulation and order filed and entered on the 5th day of December, 1903, as aforesaid, constitute a true and complete supplemental transcript of the record of all proceedings had, since the allowance of the appeal in the cause wherein The People's Gas Light and Coke Company is the complainant and The City of Chicago is the defendant, as the same appear from the original files and records of said court, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 5th day of December, A. D. 1903.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL, *Clerk*.

[Endorsed:] File No. 18672. Supreme Court U. S., October term, 1903. Term No. 132. The Peoples Gas Light and Coke Co., app't, *vs.* The City of Chicago. Stipulation that writ of certiorari to correct record issue and certified transcript ordered filed as return to said writ. Filed Dec. 9th, 1903.

FILE COPY.

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Office Supreme Court U. S.
FILED
DEC 9 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

OCTOBER TERM, 1903.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Petitioner,

against

CITY OF CHICAGO,
Respondent.

No. 132.

PETITION FOR WRIT OF CERTIORARI TO CORRECT RECORD.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
Of counsel for Petitioner.

[18,672]

[18,672.]

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

OCTOBER TERM, 1903.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Petitioner[1],
vs.
CITY OF CHICAGO,
Respondent[2].
No. 132.

NOTICE OF PETITION FOR WRIT OF CERTIORARI TO CORRECT RECORD.

Notice is hereby given that the annexed petition for a writ of *certiorari* under rule 14 will be presented to the Supreme Court of the United States, in the City of Washington, on the 9th day of December, 1903, at the coming in of the court on that day, or as soon thereafter as counsel can be heard.

New York, N. Y., December 8, 1903.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
Of counsel for Petitioner.

To GRANVILLE W. BROWNING,
Counsel for Respondent.

(1) Plaintiff in error.
(2) Defendant in error.

SUPREME COURT OF THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

OCTOBER TERM, 1903.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY, *Petitioner*,

vs

CITY OF CHICAGO, *Respondent*.

No. 132.

PETITION FOR WRIT OF CERTIORARI TO CORRECT RECORD.

To the Honorable The Supreme Court of the United States:

The People's Gas Light and Coke Company, petitioner above named, suggests to the court a diminution of the record in the above entitled cause in that there exists a mistake in the decree of the Circuit Court inadvertently made in the entry thereof, occurring in the absence from the state and circuit of the Circuit Judge who heard and determined the same, and consisting of the statement that the bill of complaint was dismissed for want of jurisdiction, contrary to the true intent of the decision that said bill be dismissed on its merits, and your petitioner respectfully presents this petition for a writ of *certiorari* to correct said mistake, or to permit the transcript of the record to be amended, and respectfully submits the following reasons why its petition should be granted:

I.

The record in this case was filed in this court on September 25, 1902, and shows that it came here on appeal from the Circuit Court of the United States for the northern district of Illinois, that said suit was instituted in said Circuit Court by bill of complaint in equity of your petitioner praying an injunction against the enforcement of a certain ordinance of the respondent City of Chicago on the ground that said ordinance impaired the obligation of a contract existing between your petitioner and the State of Illinois, that the respondent interposed a demurrer to said bill on the ground that it did not state any such cause as to entitle the complainant to the relief prayed, that, on the hearing of said demurrer, the said Circuit Court considered the merits of said cause of action and decided to sustain the demurrer, as appears from its opinion (record, pp. 20–25), that thereupon an amendment of said bill of complaint was allowed, a demurrer on the same ground was again interposed, and again on rehearing the court considered the merits of said cause of action, reaffirmed the conclusions previously announced, and determined that the demurrer to the amended bill should be sustained, as appears from the opinion on rehearing (record, pp. 86–87), that thereupon on July 30, 1902, a decree was entered sustaining said general demurrer and dismissing said bill "for want of jurisdiction" (record, p. 87), and that thereupon the whole case was removed to this court by appeal under authority of section 5 of the judiciary act of March 3, 1891, c. 517, 26 Stat. 827.

II.

Your petitioner further shows that there has been filed in this court a certificate of the clerk of said Circuit Court showing that, on December 5, 1903, there was filed in said Circuit Court a stipulation in writing, signed by counsel for the respective parties, a copy of which is hereto annexed, consenting to an order *nunc pro tunc* amending and correcting said decree so that the same would conform to the true decision of the Court, and that the opinion of said Circuit Court should be corrected in like manner; and that, thereupon, said Circuit Court, on December 5, 1903, made and entered the following order:

> "Ordered and decreed that the final order and decree heretofore entered July 30, 1902, in the above entitled suit now pending on appeal to the Supreme Court of the United States, be and the same hereby is amended *nunc pro tunc* as of said July 30, 1902, so as to state the true decision of the court by striking therefrom after the word 'dismissed,' the words, 'for want of jurisdiction,' and inserting in lieu thereof the words 'upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois,' and that the record on appeal be and the same hereby is amended accordingly, so that said appeal may be heard and decided on the decree as now amended *nunc pro tunc*."

III.

Your petitioner further shows that there has been filed in this court a stipulation in writing signed by counsel for the respective parties, consenting that said

decree of July 30, 1902, be corrected in this court, in accordance with said *nunc pro tunc* order of the Circuit Court of December 5, 1903, that the opinion of said Circuit Court on rehearing be corrected in like manner, and that such proceedings be had in this court as shall effectuate said correction as fully to all intents and purposes as if contained in the original record now in this court, so that the appeal may be heard and decided on the amended decree as expressing the true decision of the Circuit Court.

IV.

The reasons why this application was not made at the first term after the entry of the case in this court are that Mr. William D. Guthrie was not retained to argue the appeal of the People's Gas Light and Coke Company in this court until after the close of such first term, that the delay in the employment of counsel for the presentation of said case was partly due to the absence of Mr. Guthrie from the United States in January, February and March, 1903; and that Mr. Guthrie only ascertained that the decree dismissing the bill for want of jurisdiction was an inadvertent error and was not intended by the circuit judge who heard and determined the case, within the last few days, namely, on December 4, 1903, when, in the argument of another case in said Circuit Court, the court stated to Mr. Guthrie from the bench that the decree had been entered in the absence of the circuit judge who heard and decided the case and did not correctly set forth his intention, but that, on the contrary, he intended to decide the contract question upon the merits and to dismiss

the bill upon that point and only to decline to decide the question of the power of the common council for want of jurisdiction over that question.

V.

Your petitioner further shows that the practice of suffering amendments of the records of this court by *certiorari* to the lower court, or on stipulation without *certiorari*, to correct the same, is established by the rules and decisions of this court, as your petitioner is advised by counsel and therefore avers. Rule 14; *Stewart* v. *Ingle*, 9 Wheat. 526; *Woodward* v. *Brown*, 13 Pet. 1; *Hudgins* v. *Kemp*, 18 How. 530, 534; *Stitt* v. *Huidekopher*, 131 U. S. appendix, cxviii; *Chappell* v. *United States*, 160 U. S. 499, 506.

VI

Wherefore, your petitioner prays the issuance of a writ of *certiorari* for the correction of the said record in the manner set out in said *nunc pro tunc* order of December 5, 1903, or that the court suffer an amendment of said record in accordance with said stipulation without *certiorari*, by striking from the decree of July 30, 1902, therein, after the word "dismissed" in the 15th line from the bottom of page 87 of the printed transcript of the record, the words "for want of jurisdiction" and by inserting in lieu thereof in the margin the words "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois", and by correcting the opinion of the Circuit Court on rehearing in like manner, as stated in said stipulation annexed hereto.

Due and timely notice of this petition has been acknowledged by counsel for the respondent, as is shown by a communication from him addressed to and on file with the clerk of this court.

Washington, D. C., December 9, 1903.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
by GEORGE O. KNAPP,
its president.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
Of counsel for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:
City and County of New York.

GEORGE O. KNAPP, being duly sworn, on oath says that he is the president of the petitioner corporation named in the foregoing petition for writ of *certiorari*, and who has subscribed the same on behalf of said corporation; that he has read said petition and knows the contents thereof; that the matters therein set forth are true of his own knowledge.

GEORGE O. KNAPP.

Subscribed and sworn to before me this 8th day of December, A. D. 1903.

JOHN J. DALY,
Notary Public, Kings County,
Certificate filed in New York County.

[NOTARIAL SEAL.]

STIPULATION.

UNITED STATES CIRCUIT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS,
NORTHERN DIVISION.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY *vs.* CITY OF CHICAGO.	No. 25,780.

It is hereby stipulated and agreed by and between the parties in the above entitled suit that the decree heretofore entered in the above entitled suit on or about the thirtieth day of July, 1902, in the absence of the Honorable Peter S. Grosscup, Circuit Judge, before whom the case was heard and argued, and which decree does not correctly recite the judgment as intended by the court, be amended *nunc pro tunc* as of said July 30th, 1902, so as to strike therefrom, after the word "dismissed," the words "for want of jurisdiction," and to insert in lieu thereof the words "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois;" that an order or decree so amending and correcting said decree be forthwith entered without prejudice to any of the proceedings heretofore had or to the appeal from said decree of July 30th, 1902, now pending in the Supreme Court of the United States, and that such proceedings be had in said Supreme Court as shall effectuate the amendment of said

decree *nunc pro tunc* as fully to all intents and purposes as if contained in the original record now in said Supreme Court, so that the appeal may be heard and decided on the decree as now amended *nunc pro tunc.*

It is also hereby stipulated and agreed that the opinion of the court on rehearing be likewise amended *nunc pro tunc*, so as to omit therefrom, after the word "dismissed" the words "for want of jurisdiction in this court over the cause of action set forth," and to insert in lieu thereof the words, "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois," and that an order be entered amending the record accordingly.

Chicago, December 5, 1903.

SEARS, MEAGHER & WHITNEY,
Solicitors for People's Gas Light and Coke Company.

GRANVILLE W. BROWNING,
Solicitor for the defendant, The City of Chicago.

(Endorsed)—Filed Dec. 5, 1903.—Marshall E. Sampsell, Clerk.

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JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
WILLIAM F. SHEEHAN,
Of counsel for appellant.

Washington, January 8, 1904.

[18,672.]

[18,672.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1902.

No. 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing the complaint of the appellant, The People's Gas Light and Coke Company. A direct appeal was taken to this court under section 5 of the Judiciary Act of 1891 (26 Stat. 826, 827), on the ground that the case was one in which a law of a state (*i. e.*, a municipal ordinance) was claimed to be in contravention of the Constitution of the United States in that such ordinance impaired the obligation of a contract contained in the amended charter of the appellant. The cause was heard and decided by the court below upon a general demurrer (record, p. 84) to the amended bill of complaint filed by the appellant, The People's Gas Light and Coke Company, against The City of Chicago (pp. 26–83), and final judgment was entered sustaining the demurrer and dismissing the bill "for want of jurisdiction" (p. 37). Subsequently, the decree was amended so as to strike therefrom the words "for want of jurisdiction," which had been employed through inadvert-

ence, and in lieu thereof the decree was made to read that the bill was dismissed "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the state of Illinois."[1]

Although the amended bill of complaint is somewhat lengthy, under the practice recently in vogue in many circuits, what are conceived to be the ultimate essential facts are not complicated, and will be expressed in as brief and succinct terms as practicable.

The amended bill of complaint sets forth that The People's Gas Light and Coke Company, hereinafter called the People's Company, was originally incorporated by an act of the legislature of Illinois, approved February 12, 1855 (Laws of Illinois, 1855, p. 614, pamphlet of statutes, etc., p. 1), which created certain individuals and their associates a body corporate with perpetual succession and full power to acquire, hold, occupy and enjoy all such real and personal estate as might be necessary and proper for the construction, extension and usefulness of its works. The company was granted authority to proceed to the erection of the necessary works for the manufacture of gas and coke within the city of Chicago and to manufacture and sell gas for the purpose of lighting the said city or its streets and any buildings, etc., therein, and to erect all necessary works and apparatus; and it was further given power on and after February 12, 1859, or sooner, by and with the consent of the

[1] See addition to record under order of this court December 9, 1903, p. 3.

Chicago Gas Light and Coke Company, to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the consent of the city council. It was also provided in section 4 of the statute that the company should furnish and supply to the city of Chicago for its public use, at the election of the proper city authorities, a sufficient supply of gas at a rate not exceeding two dollars per thousand feet and should also supply gas to the inhabitants of said city at a rate not exceeding two dollars and fifty cents per thousand feet (record, pp. 26, 27). The reference to the Chicago Gas Light and Coke Company was occasioned by the fact that in February, 1849, that company had been chartered by the Illinois legislature, and had been granted the exclusive privilege of supplying the city of Chicago and its inhabitants with gas for the period of ten years.[1] The common council of the city of Chicago, under date of August 30, 1858, passed an ordinance granting to the People's Company permission and authority to lay its gas mains, pipes, feeders and service pipes in *any* of the streets, avenues, highways, public parks or squares *throughout* said city "subject at all times, however, to the resolutions and ordinances of the common council of said city." It was further provided that nothing in the ordinance should be construed to conflict with the rights and privileges of the said Chicago Gas Light and Coke Company if pipes were laid before February 12, 1859 (record, p. 29, pamphlet, p. 3). Thereafter, in 1865, the charter of the People's Company was amended in three particulars, namely, (1) by increasing the powers of the company, (2) by eliminating all

[1] Sec. 3, Act of February 22, 1849, record, pp. 34, 35.

reference to the Chicago Gas Light and Coke Company, its exclusive privilege having in the meantime expired, and (3) by repealing section 4 of the act of 1855 and substituting the provision quoted below. As the merits of the present controversy depend in great measure upon the legal import and effect of the wording of these amendatory provisions, they may properly be quoted *in hæc verba* as follows (record, pp. 27, 28):

> SECTION 1. "That the second section of said act be and the same is hereby so amended as to read as follows, viz: The corporation hereby created shall have full power and authority forthwith to proceed to the erection and maintenance of the necessary works for the manufacture of gas and coke within said city of Chicago, and to manufacture, supply and sell gas, to be made from any and all substances, or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, any streets, buildings, manufactories, public places or houses, therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, and with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues or public squares of said city: *Provided*, that no permanent injury or damage shall be done to any such street, alley, avenue or public square by the laying down of any such pipes. . . .
>
> § 3 . . . and the fourth section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

At the time of the passage of the amendatory act of 1865, the price charged for gas by the People's Company to consumers in the city of Chicago was the gross rate of four dollars and twenty-five cents and the net rate of three dollars and seventy-five cents per thousand cubic feet, but such rate was thereafter from time to time voluntarily reduced, so that at the time of the passage of the so-called Merger or Consolidation Act mentioned below, the price charged for illuminating gas was the net rate of one dollar per thousand cubic feet, which has ever since been maintained (record, pp. 31–33).

The People's Company duly accepted the said charter, and, in acting upon the powers and privileges granted to it and carrying out and performing its duties and obligations, invested many millions of dollars of its capital and funds by erecting gas works, plants and appliances, and by laying down pipes, mains, feeders and appurtenances (record, p. 29). At the time of the filing of the bill of complaint, it owned real estate in the city of Chicago to the value of upwards of two million dollars and personal property to the value of upwards of ten million dollars, and it had many buildings, factories, retorts, plants and apparatus for the manufacture, sale and distribution of gas in all parts and divisions of the city, and it had upwards of seventeen hundred miles of pipes and mains laid in the streets, alleys, avenues, highways and public squares thereof, and it was then engaged in the operation of the plants and the distribution of gas through said pipes, etc., to the city of Chicago, and to the citizens as consumers of its gas (record, p. 31). The city was itself, and for many years

had been, a customer of the People's Company, and consumed gas to the amount of upwards of four hundred thousand dollars annually, and the company supplied over three hundred thousand private consumers (record, pp. 32, 79).

In 1897, the legislature of Illinois passed an act entitled "An act in relation to gas companies," approved June 5, 1897, and in force July 1, 1897.[1] For convenience of reference, the statute is printed at length in the pamphlet filed with this brief. The statute by its terms applied to all gas companies then or thereafter organized, and the purport of its material provisions, which bear in any way upon the issues now presented for adjudication, may be stated.

Section 1 of the act of 1897 authorized and empowered gas companies "to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges in whole or in part to any other gas company doing business in the same city, town or village," and authorized such other company "to purchase or lease and to hold and enjoy said property." Section 2 authorized gas companies, "doing business in the same city, town or village, to consolidate and merge into a single corporation, *which shall be one of said merging and consolidating corporations.*" Section 3 has no reference to purchase or consolidation and merger, but granted to all gas companies the additional power "to manufacture and distribute gas for fuel purposes and to distribute natural gas," and provided that "all companies authorized to distribute gas in any city, town or village shall have the power to distribute the same

[1] Laws of Illinois, 1897, p. 177; pamphlet, p. 21.

in any territory annexed to such city, town or village." The remaining provisions of the act of 1897 relate to the manner and effect of the purchase, lease, or consolidation and merger authorized by sections 1 and 2, and they are important principally as emphasizing that no new gas company is contemplated, but on the contrary that, even in the case of consolidation and merger, there is preserved the distinct identity of the company "into which any company or companies are consolidated and merged under this act." Thus, in section 8 it is provided, as the legal effect of the agreement or agreements of consolidation and merger, that the companies "shall thereupon be and are hereby declared to be consolidated and merged into *the one corporation* specified in such agreement or agreements," which section 2 had declared "shall be one of said merging and consolidating corporations." Section 9 provides that the purchasing or leasing company or the consolidated corporation shall be subject to and shall perform the legal obligations resting upon the companies respectively, and that "such performance by said corporation so purchasing or leasing, or by such consolidated corporation, shall be held and considered as the performance by each of the respective companies so selling, leasing or consolidating, of the legal obligations theretofore resting upon each of them respectively." The companies are, however, to be regarded as still subsisting for the protection of their respective creditors or mortgagees, "the *separate* exercise of their respective powers, and the *separate* enjoyment of their separate privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption,

when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require." Section 11 reads as follows:[1]

> "SEC. 11. Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions:
>
> Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation and merger.
>
> Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease or such consolidation and merger."

And section 12 provides severe penalties for the violation of any of the provisions of the foregoing section 11, including liability to proceedings in *quo warranto* with a judgment of ouster of the company's franchises, etc.

The bill further alleges that in August, 1897, pursuant to the power and authority thus granted to and conferred upon gas companies doing business in the same city, the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, and the Chicago Economic Fuel Gas Company, for a valuable consideration, transferred to the People's Company, and the latter then and there acquired and took over all the gas mains, pipes, feeders, service

[1] Laws of Illinois, 1897, pp. 177, 180; pamphlet, p. 26.

pipes, connections and appurtenances and all the manufacturing plants, buildings, machinery and property of the said gas companies, and that subsequently, in January and November, 1898, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company similarly transferred to the People's Company and the latter thus acquired all the gas mains, pipes, feeders, service pipes, connections and appurtenances and all the manufacturing plants, buildings, machinery and property of the said three last named companies (record, p. 33). These ten gas companies whose properties were thus acquired were all companies organized in the state of Illinois and under its laws; their several properties so acquired were all situated in the same city, *i. e.*, Chicago, and they were all doing business in that city (record, p. 33). At the time of the acquisition of the properties of the other gas companies, the People's Company distributed the gas then manufactured by it chiefly in the west division of the city of Chicago, although its pipes and mains also extended into the south division of the city (record, p. 34), and the price charged by it for gas of the quality furnished to consumers during any part of the year preceding such acquisition of the plant of the other company was one dollar per thousand feet (record, p. 64). The other companies were furnishing gas in various divisions of the city and in annexed territory formerly comprised within certain towns or villages (record, p. 33). Upon such transfer to the People's Company, however, the various companies named ceased to manufacture and supply gas, and thereafter gas was supplied and furnished by the

People's Company to customers of the other companies (record, pp. 34, 65). The amended bill of complaint sets forth at length the history of the various companies whose properties were acquired by the People's Company and the various municipal ordinances under which they had secured the consent of the proper authorities of the city, town or village, as the case might be, to the laying of pipes or the erection of gas works (record, pp. 34, 36, 40, 44, 47, 49, 56, 58, 62). These ordinances in every instance, except the case of the ordinance of Hyde Park to the Hyde Park Gas Company, contained among other terms a provision that the price of illuminating gas should not exceed fixed rates, varying from two dollars and fifty cents per thousand cubic feet in 1881 to one dollar and ten cents per thousand cubic feet in 1891. The ordinance from the village of Hyde Park, granted in 1889 to the predecessors of the Mutual Fuel Gas Company, provided that, whilst the rate to private consumers should not exceed one dollar and twenty-five cents per thousand cubic feet, the charge to the village of Hyde Park itself should not exceed ninety cents per thousand cubic feet. The act of 1897, however, provided in section 10 that "the purchase and sale or lease, or the consolidation and merger authorized by this act, shall not be held or construed as a violation of the provisions of any ordinance or bond given thereunder."[1]

The amended bill of complaint further alleges that at the time of the acquisition by it of the plants, pipes and mains of the other gas companies, as aforesaid, under the provisions of said act of 1897, the People's Company

[1] Laws of Illinois, 1897, p. 180; pamphlet, p. 25.

was in the actual business of furnishing gas to consumers, that during the year immediately preceding such acquisition the price charged by it for illuminating gas was one dollar per thousand cubic feet, that since such acquisition it has not increased the price charged by it for gas of the quality theretofore furnished to consumers during any part of said year, and that the gas so furnished by it to consumers has been better in quality and of higher candle-power than the gas theretofore sold by such other companies (record, pp. 64, 65).

The amended bill further alleges that since such acquisition of the properties of other gas companies, the People's Company itself has furnished gas to the consumers formerly supplied by such other companies, that it has extended, enlarged and improved the plants, mains and property so acquired, that in extending, enlarging, improving and completing its system it has always and in every case proceeded and acted by virtue of the franchise, power and authority contained in its own charter and by virtue of the consent of the city of Chicago aforesaid and not under any of the powers, franchises or privileges of any of such other gas companies, and that since August 5, 1897, in laying, maintaining, using, conducting and operating its plants, gas mains, pipes, feeders, etc., and in carrying on its business of manufacturing, distributing and selling gas to the city of Chicago and to the inhabitants thereof, it has acted solely and exclusively under and by virtue of the powers in its own charter and by and with the consent of the city of Chicago (record, pp. 55–66). It is then alleged that the city of Chicago had full knowledge of the ac-

quisition and taking over of the properties of such other gas companies and consented thereto and approved, ratified and confirmed the same (record, p. 66). In 1899 the city entered into a contract with the People's Company which recognized such acquisition and provided that the People's Company should continue to light the streets and public buildings and places of the city (record, pp. 66–68). Under and by virtue of this contract, the city collected from the People's Company a percentage of its gross receipts amounting to upwards of $300,000 (record, p. 72). It is also shown that the city council has repeatedly, beginning in May, 1898, directed the People's Company to lay gas mains, etc., in all divisions of the city and in districts which had originally been served by the gas companies whose properties were acquired by the People's Company, that such directions had been obeyed and followed at great expense, and that since August 5, 1897, the city had issued to the People's Company upwards of seventy-five thousand permits to make excavations in all divisions of the city for the purpose of laying gas mains, pipes, etc., and of repairing, renewing, enlarging and completing the same (record, p. 72). It further appears that the People's Company has taken up and removed many hundred miles of pipes so acquired from other gas companies, that since August 5, 1897, it has laid upwards of five hundred miles of gas mains and pipes, that its system of mains, etc., has been largely remodeled, relaid and improved, that it is practically impossible to determine what pipes, mains and feeders, if any such there be remaining, were acquired from said other gas companies, that it has been obliged to rebuild and has substantially

rebuilt at great expense all of the plants and has relaid and replaced all of the gas pipes and gas mains in the city of Chicago acquired from such other companies, and that all the mains, etc., so acquired are used to furnish and distribute gas manufactured by it under its own charter (record, p. 74).

The amended bill of complaint then avers that the city council of Chicago, on or about October 15, 1900, without investigation or judicial proceedings of any kind and without giving or permitting a hearing of any sort to the People's Company, passed an ordinance which, among other things, provided that no corporation manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or for fuel purposes should charge, demand or collect from any consumer thereof more than seventy-five cents per one thousand cubic feet of gas consumed or used, and that the gas so manufactured should afford a light of not less than twenty candle-power, to be measured and ascertained at the place of consumption in said city by the most modern appliances known to science for measuring the candle-power of illuminating gas. Such ordinance, which is set forth at length in the amended bill of complaint, imposed penalties for the violation thereof of not less than twenty-five nor more than two hundred dollars for each and every offense (record, pp. 78, 79). The amended bill of complaint further contains specific allegations showing the dilemma of the People's Company, the inevitable multiplicity of suits with its three hundred thousand customers if the ordinance were enforced, and the insufficiency and inadequacy of any remedy at law for the protection of

the property interests involved, by reason, among others, of the financial irresponsibility of many of its customers (record, pp. 80–81).

Although the allegations of the amended bill of complaint do not definitely state whether the method of acquisition by the People's Company of the properties of other gas companies was by purchase under section 1 or by consolidation under section 2 of the act of 1897, nevertheless the contract between the city of Chicago and the People's Company, dated July 20, 1899, set forth at length in the amended bill of complaint, clearly declares that the acquisition was by way of consolidation and merger into the People's Company (record, p. 67). Such was conceded by the city in the court below (record, p. 22). It will, therefore, be assumed, as it was by the court below, that the agreements entered into between the contracting gas companies under the authority of the act of 1897 constituted a consolidation and merger as authorized by section 2, which is believed to be the undisputed fact.

The case was first heard on the original bill of complaint and upon the general demurrer filed by the defendant city of Chicago to such original bill, and it was at the suggestion of the learned court below that the bill was amended so as to bring in the histories of the constituent companies (record, p. 25). The learned court below in effect practically decided that the provision of the act of 1865 amending the charter of the People's Company and agreeing that the city council should not be authorized to compel it to furnish gas at a less rate than three dollars per thousand feet, did not protect the People's Company from the action of the city council

in respect of the property of other gas companies which it might have acquired under the act of 1897, and that as no divisional relief had been asked—that is to say, as the People's Company had not specifically asked for relief as to gas supplied by and through its own plant—the bill should be dismissed. The court refrained from passing upon the question of the power of the city council under the laws of Illinois, on the alleged ground that its jurisdiction did not extend to that question (record, pp. 23, 24).

Upon the subsequent filing of an amended bill of complaint, a general demurrer was again interposed and the court filed a supplemental opinion in which the demurrer was sustained, and the bill directed to be dismissed for want of jurisdiction in the court below over the cause of action set forth (record, pp. 86, 87). As stated above, the final decree originally entered dismissed the amended bill for want of jurisdiction, but this disposition was inadvertent. Subsequently by stipulation and order in the court below and by order of this court entered December 9, 1903, the record was corrected so that the opinion should direct the dismissal of the bill upon the merits as to the alleged contract rights of the People's Company, "but without prejudice to any other suits in respect of the question of power of the city council under the laws of the state of Illinois," and the decree was accordingly amended *nunc pro tunc* (see addition to record, p. 3).

An appeal was duly allowed and a *supersedeas* bond was filed in the penalty of six hundred thousand dollars (record, p. 89), which has operated as a stay of the enforcement of the ordinance.

ASSIGNMENT OF ERRORS.

1. That the court below erred in not holding that the ordinance of October 15, 1900, impaired the obligation of the contract embodied in the charter of the People's Company.

2. That the court below erred in holding that its jurisdiction did not extend to the question of the power of the city council to regulate gas rates.

The jurisdiction of the Circuit Court was based solely upon the ground that the suit was one arising under the Constitution of the United States. The fundamental allegation of the bill was that the ordinance of October 15, 1900, impaired the obligation of the charter contract which bound the legislature not to authorize the city council of Chicago to compel the People's Company to furnish gas at a less rate than three dollars per thousand feet. The city claimed that it had been duly authorized to pass the ordinance under and by virtue of the City and Village Act of 1872. Hence the controversy.

As was said by Mr. Justice Brown, delivering the opinion of the court in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 10:

> "We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States."

The court, at the present term, again sustained jurisdiction upon that ground in *Joplin* v. *Light Company*, 191 U. S. 150, 158. See also discussion *infra*, p. 56.

It will be assumed, as no longer open to question, that a court of equity has jurisdiction to restrain the enforcement of a void ordinance where such relief will avoid a multiplicity of suits and where there is no sufficient or adequate remedy at law for the protection of property interests. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 381; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 11; *Wilkie* v. *City of Chicago*, 188 Illinois, 444, 446; *Cicero Lumber Co.* v. *Town of Cicero*, 176 Illinois, 9, 31–32; *City of Chicago* v. *Collins*, 175 Illinois, 445, 451; *Chicago Public Stock Exchange* v. *McClaughry*, 148 Illinois, 372, 381, and *Third Avenue R. R. Co.* v. *The Mayor, &c., of New York*, 54 N. Y. 159, 161, cited with approval in the recent case of *Hale* v. *Allinson*, 188 U. S. 56, 76. The general principles which govern the right to resort to equity in analogous cases are stated by Mr. Justice Harlan in *Smyth* v. *Ames*, 169 U. S. 466, at pages 517–518, and the remarks of Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, at p. 99, are quite applicable to the large and coercive penalties imposed in the ordinance now before the court.

The allegations of the amended bill of complaint in the case at bar are so detailed in regard to the injury to property rights threatened from the enforcement of the ordinance, as to warrant the statement that no case can be cited which presented a stronger group of facts showing the necessity of relief in equity (record, pp. 79–81). As to the remedy at law, it is shown that even a temporary necessity of defending against the enforce-

ment of the ordinance for the purpose of testing its validity in the courts would result in thousands of suits and very great pecuniary loss to the People's Company, an injury quite incapable of estimate in money; and it is clear that, even though the loss were capable of estimate, there could be no recovery, since the city of Chicago could not be held responsible. *Wilkie* v. *City of Chicago*, 188 Illinois, 444, 446. The anticipated injury was, therefore, irreparable and without adequate remedy at law.

The questions presented for adjudication will be discussed under the following heads, viz.:

I.—The validity, scope and effect of the contract relied on and the impairment of its obligation (pp. 18–34).

II.—The effect upon the contract in question of consolidation under the act of 1897 (pp. 34–50).

III.—The right to partial relief in any event and its necessary consequence (pp. 50–56).

IV.—The jurisdiction of the court below and of this court to determine the question of power of the city council (pp. 56–61).

V.—The power to regulate the price of gas has not been delegated by the legislature of Illinois to the city council of Chicago (pp. 61–100).

I.

THE VALIDITY, SCOPE AND EFFECT OF THE CONTRACT RELIED ON AND THE IMPAIRMENT OF ITS OBLIGATION.

The provision of the charter of the People's Company, relied upon as a contract the obligation of which would be impaired by the ordinance of the city council of Chicago of October 15, 1900, reads as follows (record, p. 28; pamphlet, p. 6):

> "But ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common coun-

> cil of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

Before discussing the validity and scope of this provision of the act of 1865, it is important to appreciate that no inquiry is involved as to the power of the legislature of Illinois to regulate the charges of gas manufacturers or others engaged in any business more or less impressed with a public interest. It was conceded below and is now conceded that the legislature of Illinois has the power to fix reasonable rates to be charged by gas companies. Nor is there any inquiry as to the power of a city council to stipulate in an ordinance granting the consent of the city to the laying of gas pipes that the charges of a gas manufacturer shall not exceed a stated price. The sole inquiry is whether or not the legislature of Illinois, although retaining unimpaired its own power to regulate, did or did not contract with the People's Company that the city council of Chicago would not be authorized to compel the company to furnish gas at a less rate than that specified in the act of 1865.

It should also be stated, in order to anticipate a repetition of the *argumentum ab inconvenienti*, that the People's Company is not claiming, as against the city of Chicago and its inhabitants, the right to exact three dollars per thousand feet for its gas, but admits that, having availed of the benefit of the so-called Consolidation Act of 1897 and thereby acquired the plants of other gas companies, it can now only charge the rate which it had been charging during the year immediately preceding the acquisition of such properties, namely, one dollar

per thousand cubic feet (sec. 11). Its contention, therefore, in effect is simply this, that the provisions of its charter protect it against action by the city council reducing the price of gas below one dollar per thousand feet, although it does not challenge, but on the contrary expressly concedes, the power of the legislature to regulate the price of gas and to prescribe reasonable rates. If the legislature of Illinois shall see fit to reduce the rate to be charged by gas companies below the price authorized by the act of 1897, it will be time enough then to consider the question whether such a low rate as seventy-five cents per thousand feet is reasonable and would afford just compensation to the People's Company, having due regard to the fair value of the service rendered to the city and its inhabitants and of the capital actually employed in this public business.

Another argument urged in the court below ought likewise to be at once disposed of, namely, that the contract was void because the regulation of gas companies was comprehended in what is generally called the police power of the state, and that a legislature cannot limit or bargain away the right to exercise the police power by a subsequent legislature. But the decisions of this court have surely settled that question, and there can no longer be the slightest doubt as to the power of a legislature to grant to a gas company the exclusive privilege to furnish gas to a particular city or the right to charge a particular rate. This point, it is submitted, was fully covered and set at rest in the case of *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 658, 670, where Mr. Justice Harlan,

delivering the unanimous opinion of the court, among other things, said:

> "It is true as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that 'the adventurers in gas-lights did more for the prevention of crime than the government had done since the days of Alfred.' Knight, vol. 7, ch. 21; Macaulay, ch. 3. . . . It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be pro-

> tected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made in some form a charge upon the public, or the public would have been deprived of the security in person, property and business which comes from well-lighted streets."

There is still another argument advanced on behalf of the city of Chicago which it may be proper and convenient to notice at the outset in view of the fact that it seems to have impressed the learned court below, namely, that the contract made in 1865 should be interpreted in the light of subsequent events and changed conditions, and that it was certain in 1865 that the legal tender dollar would some time rise to its true value and in the course of events that the cost of manufacturing gas was bound to grow less (record, p. 22). Yet, it had been supposed that if there was one proposition in our jurisprudence, or what, for want of a better term, may be called constitutional morality, that had been settled by the labors of this court, it was that the validity of a contract is to be determined by the conditions existing when the contract is made and not by what the future may have developed. Would it not, indeed, be an astonishing doctrine to announce that the obligation of a contract between a state and a corporation or individual is to be measured by the conditions which may happen to exist thirty-five or forty years after the contract was made! As Mr. Justice Jackson said in *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 502:

> "Legislative contracts, especially, should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they

were made, rather than at a later period when different ideas and theories may prevail."

It is submitted, with the utmost confidence, that if the legislature in 1865, for the purpose of inducing the investment of capital and the undertaking of a great public improvement, had expressly stipulated that the People's Company might charge a specified rate for gas, the contract would have been inviolate and the legislature and the city could not have gotten rid of it except in the manner pointed out by Mr. Justice Harlan in the *New Orleans Gas* case above cited, namely—by condemnation, for under the constitution and laws of Illinois in force in 1865, there was no power to alter, amend or repeal the charter of the People's Company. In such a case, this court would declare, as has been declared so often, that as long as the contract existed, it must be observed according to the clear meaning of its language, and it would again teach the salutary lesson that "there is no wealth or power equal to that which ultimately comes to a state when in all her engagements she keeps her faith unbroken."[1]

In view, however, of the arguments urged in the court below, it may, perhaps, not be inappropriate to recall the surrounding circumstances when in 1865 the legislature of Illinois entered into the contract now before the court.

It was February 7, 1865, ten days before the surrender of the city of Columbia to General Sherman, a month before Lincoln's Second Inaugural, two months before Five Forks and Appomattox. It was a day of

[1] Mr. Justice Field in *Hartman* v. *Greenhow*, 102 U. S. 672, 682.

confident hope, but still of awful anxiety and uncertainty; a day when our President was writing that immortal message of malice toward none, but charity for all, and saying for the Nation that "with high hope for the future, no prediction in regard to it is ventured". Many were the doubters, and there was much to discourage; the great problem of paying the colossal national debt had to be solved; no one could foresee what convulsions would attend the disbandment of a great army and the return to normal conditions; educated foreign observers and patriotic Americans were apprehending disaster and ruin by reason of our inflated currency and unparalleled national debt, and our inspired leader was proclaiming that the fight might have to "continue until all the wealth piled by the bondman's two hundred and fifty years of unrequited toil shall be sunk." We have singularly misread the history of those dark days of February, 1865, if it can now be truly said that the legislature of Illinois and the capitalists who were asked to invest and hazard their money in this necessary public improvement were then contracting "in face of the certainty that the legal-tender would some day rise to its true value" (record, p. 22). In fact, there has been no period in our history when financial problems were more uncertain or the outlook for capital more gloomy and discouraging. Moreover, as is well known, the state of Illinois was then slowly recovering from a period of great financial depression and embarrassment, the history of which is traced in the Tenth Census Report on Valuation, Taxation and Public Indebtedness, 1880, pp. 623–626. Her credit was still at a low ebb and the credit of her municipalities was little

better. The city of Chicago at that time contained a population of only 178,492; the total valuation of all property was $64,709,177, and the total tax was $1,294,183. The city covered a limited district; its streets were mostly unpaved; it was to a great extent without sewers or sanitary improvements, and its streets were only partly lighted. The tax limit of the city had been reached; and its borrowing capacity was then and for many years continued to be insufficient for its needs. It is a matter of common history that the state of Illinois and her municipalities, particularly the city of Chicago, were then in the attitude of soliciting subscriptions of capital and endeavoring to induce investors in other states to undertake the risk of necessary public improvements for the benefit of the people, with the hazard of loss and perhaps financial ruin to the promoters; that neither the state nor the cities were then in a position to undertake necessary improvements such as the lighting of their streets and buildings by means of taxes or by the pledge of their credit, and that special inducements had to be offered to foreign capital. The inducement in the case at bar was reasonable protection against adverse action by the city council of Chicago. The rates of gas prescribed in section 4 of the original act of 1855, namely, two dollars per thousand feet to the city of Chicago, for public use, and two dollars and fifty cents per thousand feet to the inhabitants of said city, had proved unsatisfactory and were below the charge generally prevailing in other cities. Notwithstanding the provision of section 4 of the act of 1855, the People's Company, as the demurrer admits, had for several years

actually charged a gross rate of four dollars and twenty-five cents per thousand cubic feet, and a net rate of three dollars and seventy-five cents per thousand feet, which was the rate prevailing at the time the amendatory act of 1865 was passed (record, p. 31). When in 1865 section 4 was repealed and the company was left at liberty to charge a greater rate than two dollars, the legislature in the public interests provided that after the expiration of ten years the common council of the city of Chicago should have the right to regulate the price of gas, but with the proviso that the legislature should in no case authorize such common council "to compel the said company to furnish gas at a less rate than three dollars per thousand feet." An examination of the rates prevailing in other cities in 1865[1] will show that the rate of three dollars per thousand feet was not unusual or excessive. It was as matter of fact twenty per cent. lower than the People's Company was then charging. The legislature was not gifted with the power of seeing into the future; it dealt with existing conditions, and, so far as it could then judge of the public interests, the provision was a proper one, particularly as the legislature retained its own power to regulate as future developments might justify. Immunity from regulation *by the city council* below the specified rate, however, was stipulated for, and without it those investing their capital would presumably not have proceeded further with an enterprise the whole hazard and risk of which they were assuming.

The reason why the incorporators of the People's

[1] Bankers' Magazine & Statistical Register, vol. XIX.

Company exacted a provision in the charter protecting the company against action by the common council is obvious. The city was sure to be itself a large user of gas, and its council would be composed, in part at least, of men who were themselves private consumers of that gas, and who were elected to office by the votes of other consumers. Indeed, the city at the time of the passage of the ordinance of 1900 was itself a consumer of gas to the amount of upwards of five hundred and fifty thousand dollars per annum (record, p. 32). To have given the city unrestricted power to regulate the prices of the People's Company, would have made the city and its councilmen judges in their own cause, and would have given an opportunity for very likely abuses of power. It cannot, therefore, be seriously doubted that the provision of the charter of the People's Company that the "common council of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet" was deemed of the utmost importance by those who invested their capital in the enterprise. These investors might well be willing to risk their means upon the faith of the general legislature treating them fairly, and yet be unwilling to abide by the decision of the city's common council, all of whom and all of whose constituents would be personally interested in cutting down the price of gas as soon as they had secured the benefit of the erection of gas plants and the investment of capital therein. The possibility of abuse under such a condition of affairs is well illustrated by the case of the *Cleveland Gaslight & Coke Co.* v. *City of Cleveland*, 71 Fed. Rep. 610, 612, where the late Mr.

Justice Jackson, then Circuit Judge, among other things said:

> "The question that now faces the court is whether a municipal corporation, itself a consumer of gas, as alleged in the bill, in its corporate relation to the company, to the extent of $5,000 or $6,000 per month, can, under the legislative sanction conferred by section 2478 of the Revised Statutes of Ohio, fix, or has the constitutional right to fix, the terms or price at which itself and all other consumers shall pay for the gas furnished. It would be a fearful proposition—monstrously absurd and outrageous—if the legislature were to undertake to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing under this section No. 2478, as disclosed by the bill."

Mr. Justice Jackson was but reiterating what Lord Coke had said centuries ago that "*non potest esse judex et pars*" (Coke Lit., sec. 212), and what Lord Chief Justice Hobart repeated in the famous phrase that "even an act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." *Day* v. *Savadge*, Hobart, 85.

It may be proper to add that it is not urged in the case at bar that a delegation of power to a city council to fix gas rates would be void because of interest; and it is not, therefore, necessary to discuss that question. Nevertheless, the deeply rooted principle obtaining among us against allowing any body of men to be the

judges in their own case emphasizes the fairness and propriety of now enforcing the stipulation solemnly made by the legislature of Illinois when in 1865 it promised that it would not authorize the city council of Chicago to reduce the rates below the specified figure.

At any rate, on the strength of this provision, many millions of the capital of the People's Company have been invested in its plant for manufacturing and distributing gas (record, p. 72). The state and city and the inhabitants of Chicago have had the full benefit of the contract. The provision in question is plainly a part, and an important part, of the contract between the state and the People's Company, and clearly comes within the doctrine of the *Dartmouth College* case and succeeding decisions, holding that such an enactment is a contract and that "justice and good policy alike require that the protection of the law should be assured to it." *The Binghamton Bridge*, 3 Wall. 51, 74. See also *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 641; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 670; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674, 680, and other familiar cases to the same effect.

It is, of course, appreciated that it is not within the province of the court to determine the wisdom, fairness, or impropriety of legislative contracts by means of which public improvements are secured, and that an apology ought to be made for such an extended introduction to the narrow question presented for adjudication. The only excuse for such prolixity is that the case is of vital importance to the appellant, and that a failure to notice or anticipate similar arguments may

have led the court below into what is conceived to be a decision based upon premises which quite disregarded the settled doctrines of this court.

A perusal of the language of section 3 of the act of 1865 must impress the court with the conviction that the provision means exactly what it purports to say, and can mean nothing else, namely, that the "common council of the city of Chicago, shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet," and that such language necessarily implies that the legislature will not delegate any such power to the city of Chicago. Of course, such a municipality has and can exercise no powers except those delegated by the legislature. *Atkin* v. *Kansas*, 191 U. S. 207, 220.

The legislature promised the incorporators that, if they would proceed with this public improvement, the city council should not have power at any time to reduce the rates below three dollars per thousand feet, although the legislature itself reserved the right so to do whenever the public interests demanded such action. It would be difficult to select words in the English language more clearly expressing the evident intention to secure to the People's Company immunity from interference on the part of the city council within the limits prescribed.

If words mean anything, the provision means, as plainly as language can express it, that the city *shall not be delegated the power* to compel the company to furnish gas to itself and its inhabitants at less than three dollars per thousand feet, as well as that the legislature shall not delegate that power to the city council. The

legislature is the source of all the city's power, and a contract that the legislature will not authorize the city to do a thing necessarily means that the city shall not have power to do it.

When the act of 1865 containing the provision now in question was passed, the constitution of Illinois did not contain the clause now found in the constitution of 1870 (art. II, sec. 14), that "No . . . law . . . making any irrevocable grant of special privileges or immunities shall be passed," nor did it contain any other clause preventing the state from granting an irrevocable right or privilege to any corporation.

The charter of the People's Company of 1855 granted authority "to lay pipes for the purpose of conducting the gas in *any* of the streets or avenues" of Chicago, "with consent of the city council," provided that "no permanent injury or damage shall be done to any street," etc., and granted the right "to manufacture and sell gas" throughout the city (record, p. 27). The city's consent in the ordinance of 1858 was equally extensive and embraced "*any* of the streets, avenues, highways, public parks or squares throughout said city" (record, p. 29). Such a consent extends to every existing and every new street, and is in perpetuity. *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 533, cited with approval in *Illinois Central Railroad* v. *Chicago*, 176 U. S. 646, 666; see also *Chicago Gas Light Co.* v. *People's Gas Light Co.*, 121 Illinois, 530, 538. It was, therefore, the legislature and not the city council that granted the franchise which extended to the whole city, and the consent of the common council was merely an administrative act limited to the laying

of pipes. *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 32.

The amendment of the charter by section 1 of the act of 1865 could have had no other purpose than to make it clearer that the right to manufacture, supply and sell gas should extend to the whole city and "*any* streets, buildings, manufactories, public places or houses therein contained," and that the company should not only have the right to lay down gas pipes in and along *any* of the streets, alleys, avenues, or public squares of said city, but should have the right to use them (record, p. 28).

A perusal of these acts of 1855 and 1865 must make it evident beyond peradventure that the franchises granted to the People's Company extended throughout the whole city; and the consent of the city council, embodied in the ordinance of August 30, 1858, was equally comprehensive, as shown by the quotation made above, and it clearly extended to any of the streets, avenues, highways, public parks or squares throughout the city.

The learned court below suggested that the People's Company had originally manufactured and distributed gas only upon the west side of the city of Chicago, and that its south side and north side systems were acquired through merger or purchase under the act of 1897 (record, p. 22). It may be true that the People's Company up to 1897 had confined its principal operations to the distribution of gas upon the west side of the city, although its pipes and mains also extended into the south division (record, p. 34), and yet this would in no way affect the scope of its charter or of the

ordinance of 1858. The People's Company could not have surrendered or abandoned its right or duty in respect of any part of the city. Had it attempted to do so, it would have been held, under the Illinois decisions, to have constituted an illegal abandonment of a public duty. Thus, in the case of *Chicago Gas Light Co.* v. *People's Gas Light Co.*, 121 Illinois, 530, 538, among the questions presented was that of the power of the People's Company to contract with the Chicago Gas Light Company that it, the People's Company, should confine its operations to the west division of the city; and it was held that the company had no such power, and consequently that the contract was void. Speaking of the provisions of the charter of the Chicago Company, which in this respect are similar to the provisions of the charter of the People's Company embodied in the acts of 1855 and 1865 now before the court, Mr. Justice Magruder, delivering the unanimous opinion of the Supreme Court of Illinois, said:

> "Under its charter appellant had the right to make and sell gas to be used for lighting all the divisions of the city of Chicago and all of the streets and buildings therein. It had as much power and authority to lay pipes in the streets of the west division as in those of the north and south division. . . . The manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such grant, are of a public nature. Where the right to make and sell gas to the city and its inhabitants, under the conditions here named, is conferred upon a company, it is so conferred as well for the benefit of the public as of the company."

Moreover, in addition to the grant in the charter of the People's Company and to the permission and authority conferred under the ordinance of 1858, the legislature, in section 3 of the act of 1897, expressly conferred upon all companies authorized to distribute gas in any city, the power to distribute it in any territory annexed to such city.

It would seem to follow that the charter rights of the People's Company expressly extend to any streets and avenues throughout the city of Chicago; that it is immaterial that its business had been for many years limited to one or two divisions; that if it had in 1897 or at any time prior to the consolidation extended its mains and pipes, it would have been entitled in respect thereof to all the rights conferred by its charter, and that since the consolidation it could lawfully have extended, as it actually did extend, its plant under its own charter and ordinance (record, pp. 72–75). It now remains to consider whether the contract right to immunity from regulation by the city council was surrendered or lost by the acquisition and use of the plants of other gas companies under the Consolidation Act of 1897.

II.

THE EFFECT UPON THE CONTRACT IN QUESTION OF CONSOLIDATION UNDER THE ACT OF 1897.

The recent decision of the Supreme Court of Illinois in the case of the *People ex rel. Deneen* v. *People's Gas Light & Coke Co.*, supplementing the prior decision in *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421, has settled the important, if not con-

trolling point, that a *new* corporation was not created by the proceedings taken under the act of June 5, 1897. It can, therefore, no longer be argued that by the consolidation agreements a new corporation was created; and it follows that the authorities which have heretofore been principally relied upon by the city have no application. The appellant, The People's Gas Light and Coke Company, is exactly the same corporate entity as existed prior to the acquisition by it of the properties of other gas companies in 1897. Indeed, acting under and by virtue of the act of 1897, it was impossible to create a *new* corporation, for the act itself forbade it, and expressly provided that the only consolidation and merger thereby authorized was "into a single corporation, which shall be one of said merging and consolidating corporations," and as if to prevent the slightest possibility of misunderstanding, section 8 of the act expressly provides that—

> "The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements."

See also particularly the wording of sections 9 and 10.

Delivering the opinion of the Supreme Court of Illinois in the recent *quo warranto* proceedings, Mr. Justice Wilkin, after repeated references to the present People's Company as the corporation organized under the acts of 1855 and 1865, and carrying on business thereunder, used the following language (pamphlet, p. 61):

> "Although the general rule is that the consolidation of several corporations into a new one invests the latter with all the rights and privileges

of the several constituent companies, *such is not the result of consolidation or merger under this statute.* Section 2 expressly provides that the consolidation and merger into a single corporation must be into one of the merging and consolidating corporations, which by section 11 shall be, at the time of availing itself of or accepting the benefits of the act, in the actual business of furnishing gas to consumers. By the last clause of section 8 it is provided:

'The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements.' While section 9 makes the consolidated corporation subject to, and requires it to perform for each of the companies so entering into said agreement or agreements, the legal obligations resting upon each of them, respectively, under their respective charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct, it does not confer upon it any enlarged powers or privileges. Moreover, there is nothing whatever in the petition to show that the rights, privileges and franchises of any or either of the consolidated or merged companies are larger or in any way different from those of the respondent."

There can, therefore, be no reasonable doubt, as well under these decisions and the allegations of the amended bill of complaint as by the terms of the Consolidation Act of 1897, that it is the original People's Company that has acquired and now owns the property of the other gas companies, that the People's Company is actually furnishing the gas in question, and that this business is being conducted under its charter and under the consent of the city embodied in the ordinance of 1858, which embraced the whole city.

Had the People's Company laid its own mains and pipes in all the divisions covered by the other companies, no one could have questioned the application of its charter. The consent given in 1858 remains in full force and effect. What possible difference can it make that, instead of laying new pipes, it acquires and uses pipes laid by other companies? It can even now lay new pipes alongside of the pipes of those other companies. Is it to be declared as the legal result contemplated and intended by the legislature that the mere acquisition and use of the plants and pipes of the other companies deprives the People's Company of its own charter rights? Is it to be supposed that the history of the pipes through which the company now supplies gas is to determine whether *its* rates shall or shall not be subject to reduction by the city council below one dollar per thousand feet?

It has, indeed, been decided in the case of the *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421, that it is the People's Company that is supplying the gas and not any other, for Mr. Justice Windes, delivering the opinion of the court, among other things, said in regard to the effect of the Consolidation Act of 1897:

> "A reference to this section [sec. 11] and the first section of the act makes it plain that the price which should not be increased after the consolidation, is the price which was charged by the company into which other companies are consolidated and merged under the act. The company to which other companies may sell or transfer their rights, franchises and privileges must, under the first section of the act, be a 'gas company doing business in the same city, town or village,' and that

company, under the section quoted, must have been, at the time of the sale or consolidation, 'in the actual business of furnishing gas to consumers.' From this it is evident that the language in section 11, viz., 'Such corporation shall not increase the price charged by it for gas,' etc., refers to the company in which the other companies were consolidated, or to the purchasing corporation, and to the price charged by it for gas in the same city for any part of the year immediately preceding the consolidation."

The People's Company under its charter had unrestricted power to purchase real estate and to erect thereon such manufacturing plant as it should see fit without the consent of the city council, and the only thing which prevented it, before the passage of the act of 1897, from purchasing the real estate and plants of the other companies, was that *they* had no authority to sell and were competing companies. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 302, 303. The act of 1897 having permitted such sale and purchase, what difference is there between land acquired by the People's Company from other companies, and land acquired from any party, or between a gas manufacturing plant bought by the People's Company from any of those companies, and a similar plant erected by it on land bought from other parties? Is it possible that the right of the city council to regulate the price of gas furnished by a company formed since 1870 can affect the real estate which a statute has authorized that company to dispose of to a company organized under a special act prior to 1870? The right to hold real estate was derived from the People's Company's charter and the act of 1897 and not from any city

ordinance. Moreover, the city having consented that a gas factory should be erected on a given spot, and the state having authorized its disposition to another company, why should the city's power to regulate the price of gas made by the original company in that factory attach to the factory or pipes so as to follow them into the hands of a company over whose prices the city has no power of regulation?

The act of June 5, 1897, was enacted with knowledge on the part of the legislature, derived from its own special enactments, that the People's Company might acquire the properties of the other gas companies, and that the latter would turn over their properties to the People's Company. A merger had already been attempted, but had failed because there was no statute authorizing it. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 283. In fact, the act reads as if it had been drawn with especial reference to the wishes of these Chicago companies as well as the interests of the people. It was realized that competition and other circumstances had greatly reduced the price charged for gas, and it was provided in the interest of the people that those prices should never be increased. It was also realized that the People's Company's charter contained a clause of considerable importance, preventing the city from regulating the price of gas. Had the legislature intended to impair the force of that clause in any way, it would have been very easy to provide for a termination of all the old charters and the formation of a new company. The familiar cases in this court upon the point clearly indicated to all concerned that this was the proper

course if existing privileges or immunities were not to survive and continue in full force and effect. That this was not done, that the act expressly provides against impairment of any franchises, licenses, or privileges, and that it also clearly indicates that the company purchasing the others, or into which the others consolidate, shall continue its existence under its original charter, prove that the legislature intended that the provisions of the People's Company's charter or of the charter of any other purchasing company should not be lost. The subject was distinctly before the legislature, and it practically declared that the only conditions it would impose in limitation of existing powers and rights was that the charge for gas should not exceed what the purchasing company was then charging and that the quality should be preserved. Upon such a construction of the act, the parties interested in the existing companies had a right to rely, and it cannot be doubted that they did so rely.

Nor is there any conflict or repugnance between this general legislative declaration and the specific stipulation in the charter against action by the common council. The legislature could have enacted both provisions in the one statute without necessary inconsistency. It could have declared that whatever it might see fit itself to do in the future as the sovereign legislative body of the state, whether to increase or decrease the rate as circumstances might warrant, nevertheless the People's Company should be protected against the possible abuse by the city council of any such power of regulation, provided it did not increase its charges beyond those then prevailing.

The learned court below said that the city's power over rates(whatever that power might be) as regards the plants of companies formed since 1870, could not have been affected by the People's Company's acquisition of those plants, because "no consent of the city has been given to the merger" (record, p. 23). It is submitted that the consent of the city to any purchase or merger was not essential. The legislature's power was supreme. *Town of Cicero* v. *City of Chicago*, 182 Illinois, 301, 309; *Cicero Lumber Co.* v. *Cicero*, 176 Illinois, 9, 22; *Atkin* v. *Kansas*, 191 U. S. 207, 220; *Williams* v. *Eggleston*, 170 U. S. 304, 310; *New Orleans* v. *N. O. Water Works Co.*, 142 U. S. 79, 91. It authorized the acquisition of the plants of other companies, and the right to operate, use and maintain was necessarily included. There is nothing in the act of 1897 to support the idea that the legislature contemplated that a consolidation, merger or purchase could not become effective until the city council had given its consent. On the contrary, it did not intend that the city should have anything to say in connection with any steps authorized to be taken. But, were this not so, the consent of the city has been given unqualifiedly and in the most effective way. After the People's Company had acquired the plants of the other companies, the city continued with that company the arrangements for lighting the streets, public buildings, etc., formerly made with the other companies and recognized that company as authorized and obligated to operate the plants of the other companies. On eighteen different occasions between May 2, 1898, and March 11, 1901, inclusive, the city *ordered* the People's Company to lay

gas mains in streets which formerly did not have them, and to supply the residents with gas, although in many instances the streets were contiguous to the territory at one time occupied by the companies whose plants the People's Company had acquired (record, p. 69). These acts of the city manifested in the most emphatic way its consent to what had been done under the act of 1897, and should estop it from now claiming the contrary.

The People's Company does not contend that in acquiring the plants of other companies, it did not assume the obligation to perform any contracts between the existing corporations and the city of Chicago. It may be conceded that so far as any existing company had contracted with the city not to charge more than a given rate in respect of its plant, the People's Company must observe the obligation. That contingency was contemplated by the legislature, and it was satisfied to provide practically that the rate should not exceed one dollar per thousand feet, which was lower than the rate for illuminating gas to private consumers contained in any existing contract. Therefore, so far as the public were concerned, they were not prejudiced by consolidation, and no contract that the city had as to rates was injuriously affected. On the contrary, it was benefited by the reduction.

Of course, it cannot be argued that, as to the properties of the existing corporations acquired by the People's Company, the latter assumed any greater obligation than was resting on the companies transferring their plants. In the case of each and every com-

pany which had a contract with the city fixing a maximum rate embodied in the consent to lay its pipe, the city council had no power to amend that contract at its will. The doctrine of the cases of *People* v. *West Division Ry. Co.*, 118 Illinois, 113, 118, and *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 397, would clearly prevent any such attempt to so amend the city's consent after acceptance by the gas companies.

But even if this were not so and even if the consolidation involved a breach of contract between the city and one or more of the consolidating companies, the legal rights of the People's Company could not be affected. Conceding, for the sake of argument only, that one or more of the consolidating companies had no right as against the city to dispose of their property to the People's Company, that fact would not bear in any way upon the question of the right of the latter to charge a given rate *for gas supplied by it.*

The learned court below suggested that as, under section 9 of the act of 1897, the purchasing or consolidated corporation should be subject, for each of the other companies, to all the legal obligations resting upon them respectively, such purchasing or consolidated corporation must, to that extent, "submit to the state's right of reasonably regulating the price of gas from time to time," as one of those obligations (record, p. 24). That may be conceded, and not in any way affect the right of the People's Company to be protected against the action of the city council as to gas supplied *by it.* The words of the act are, "legal obligations now resting upon each of them, respectively, under their respective charters and

ordinances" (sec. 9). Such words would cover the obligation to furnish gas at prices not exceeding those named in the several ordinances under which the respective companies were originally permitted to lay their mains in the streets and begin business, and it does not appear that the People's Company has failed in the slightest degree to perform any of those obligations; but it would be stretching the words unwarrantably to hold that there can be an obligation *now* resting upon a corporation to conform to an ordinance which has not yet been passed. Certainly this language cannot refer to any later date than the date of the purchase or consolidation.

Section 9 of the act of 1897, it should be noted, preserves the legal obligations of the old companies to precisely the same extent whether there is a purchase or lease, or a consolidation and merger. It is, therefore, immaterial whether the People's Company acquired the property of the old companies in the one way or in the other. In neither case, it is submitted, would its acquisition of those properties and franchises involve any obligation to comply with ordinances not in force at the date of such acquisition.

In order to test the question further, let us suppose that the People's Company had by its charter been limited to say fifty cents per thousand feet and had then acquired by legislative authority the property of several other gas companies authorized to charge more. Would it for a moment have been doubted that the charter limitation upon the prices of the People's Company applied to all gas thereafter *supplied by it* even though through mains at one time belonging to the other

companies? The complete and sufficient answer would have been that it was the charter of the People's Company which was the measure of its rights and duties.

Innumerable cases were cited by the city to sustain the proposition that, upon consolidation and the creation of a new corporation, existing immunities from taxation or regulation will not survive unless that be distinctly provided in and by the statute authorizing consolidation or merger. It is not deemed necessary to discuss and distinguish these cases. It has never been intimated in any case that, where no new corporation was formed, the old company into which others were merged lost any of its charter rights and powers by merely acquiring the property of other companies. That is the question now presented.

The principal argument and reliance on the part of the city of Chicago appears to be that it was the intention of the legislature, in and by the language of section 9 of the act of 1897, to provide that every corporation purchasing or leasing under section 1, or consolidating under section 2, should lose or forfeit all of its existing powers, privileges or immunities, except so far as might be necessary for the protection of its separate creditors or mortgagees, and that consequently every corporate power, privilege and immunity contained in the People's Company's charter must be deemed "suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease so far as, and for such time as, the protection of such creditors or mortgagees may require."

If this argument be sound, the necessary and inevitable result, following the city's argument to its logical conclusion, must be that, although no new corporation is or can possibly be created by consolidation under the act of 1897, nevertheless, in the case of purchase or lease or consolidation alike, the exercise of all the powers and the enjoyment of all the privileges and immunities of the corporation acquiring the property of other gas companies must be deemed suspended. In other words, it is seriously submitted that in the case at bar all the powers, privileges and immunities of the People's Company are to be deemed suspended, and that it has now no right to exercise any corporate power, privilege or immunity whatsoever!

If it be suggested that this *reductio ad absurdum* is but a mere play upon words, or a sophistical process of induction, it is with all confidence submitted that there can be no other result if we are to adopt the construction placed by the city of Chicago upon section 9.

Of course, it is obvious that this construction is not the true one, and that the legislature was dealing with the question of the *separate* rights, titles, interests, powers, privileges and immunities of the companies transferring their property to the acquiring company. The plain meaning of the language used and the grammatical construction clearly show that the rights, powers, privileges and immunities which are to be preserved for the benefit of creditors and mortgagees and suspended until the rights of creditors and mortgagees require their assertion, are those of the companies selling or leasing under section 1, or disposing of their prop-

erty by consolidation under section 2. In the case at bar, as appears by the amended bill of complaint, the original companies all had creditors and issues of mortgage bonds (record, pp. 75, 76). Such mortgages undoubtedly covered the franchises, powers, privileges and immunities of the existing companies, and, in order to avoid an impairment of the obligation of the contracts of mortgage, it was necessary that those franchises, powers, privileges and immunities should, to that extent, be preserved. The intention plainly was to preserve "the *separate exercise* of their respective powers and the *separate enjoyment* of their *separate* privileges and immunities," but not in any way to qualify or limit the joint exercise or joint employment by the acquiring corporation so far as might be necessary to effectuate the purchase, lease or consolidation.

It would be an absurdity for a legislature to provide in one breath that there should be no new corporation created by the consolidation, and in the next breath provide that all the corporate powers, privileges and immunities of the company acquiring the property of other corporations should be suspended.

Moreover, in framing the Consolidation Act of 1897, the legislature of Illinois had in mind and expressly dealt with the subject of regulating the price to be charged for gas by any corporation "into which any company or companies are consolidated and merged under this act"; and therefore specifically provided that such corporation "shall be subject to the following provisions," viz. (sec. 11):

> "Such corporation shall not increase the price charged by it for gas of the quality furnished to

consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger.

Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger."

The understanding by the legislature of the language it was thus using cannot be in doubt. Presumably it knew existing conditions as disclosed by its own legislation, and it intended to regulate the price to be charged for gas by any such consolidated corporation as clearly as though it had declared that intention in so many words, *e. g.*, that the People's Company, if "availing itself of or accepting the benefits of this act," should thereafter not increase its price above the rate of one dollar per thousand cubic feet, which it was then charging.

Let us state the converse of the present proposition, and suppose that one or more of the companies whose property was acquired by the People's Company then had valid contracts with the city giving them the exclusive right for a term of years to furnish gas in a certain division of the city or in one of the towns or villages annexed to the city, at the rate of two dollars per thousand feet (which is practically the case as to at least one of the companies). Would the People's Company, "into which such company or companies [were] consolidated and merged under this act", have been entitled to charge the two dollar rate in any part of the city? Certainly not; because the plain and unmistakable language of section 11 of the act of 1897 would preclude any such charge. It would have been held, as in the case

of *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421, that the legislature had regulated the subject of prices to be charged by the acquiring or consolidated company and had prescribed the rate. It would be said, and conclusively said, that the legislature had regulated the price, and that such regulation was absolutely binding upon any corporation availing of and accepting the benefits of the act of 1897, anything contained in the charters or ordinances of the other companies to the contrary notwithstanding.

The contention of the city, however, would seem to be that the provision of section 11 of the act of 1897 should read as if the legislature had added the words, "but such price shall be subject to reduction by the city council of cities from time to time." This contention cannot deserve further consideration than to state it, for it is not within the power of any court, in the interpretation of statutes, to add any such affirmative provision.

The legislature, in the act of 1897, did not suppose it was doing an unnecessary thing or that it was enacting a law which could be overthrown at the will of the city councils. It is not reasonable to assume that in enacting this specific regulation as to the price of gas to be charged by the purchasing or consolidated corporation, the legislature contemplated that it had already delegated to city councils the power to regulate gas rates and that these subordinate bodies, its creatures, would be vested with authority to practically nullify that which the legislature under its sovereign power had declared should be lawful. Yet that is the position of the city.

It is, therefore, submitted that, in view of the allegations of the amended bill of complaint admitted by the demurrer, the provision of section 3 of the act of 1865 restraining the action of the city council applies to all gas supplied by the People's Company to the city or to any other consumers, and that the power to regulate its charges below the rate of one dollar per thousand cubic feet can only be exercised by the legislature.

III.

THE RIGHT TO PARTIAL RELIEF IN ANY EVENT AND ITS NECESSARY CONSEQUENCE.

The learned court below did not decide that the consolidation had created a new corporation or that the People's Company had thereby lost its contract rights, but it ruled that it was unnecessary to determine whether or not the People's Company by the consolidation and merger had lost all its right to exemption from regulation of its rates *by the city council* as to its own plant and the pipes not acquired through consolidation, because the bill asked for no divisional relief. It is submitted that the court inadvertently fell into error, and that if any part of the bill was good and entitled the complainant to relief as to the gas furnished by it through its own plant and mains or pipes, it was error to dismiss the bill and deny all relief. The demurrer was general and covered the whole bill, and if any part of the bill was good, the demurrer necessarily failed and should have been overruled. Such has long been the established practice in equity. *Tivington* v. *Story*, 9 Peters, 632, 658; *Pacific R. R. of Mo.* v. *Missouri Pac. Ry.*, 111 U. S. 505, 520; *Heath* v. *The Erie Rail-*

way Company, 8 Blatchford, 347, 407; *Savannah, F. & W. Ry. Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 79 Fed. Rep. 35, 38; 1 Daniell's Ch. Pr. (6th Am. ed.), p. 579; Story's Equity Pleadings, sec. 443; Fletcher's Eq. Pleading & Practice, sec. 204; 1 Foster's Fed. Pr., sec. 107.

The People's Company was, therefore, in any event, entitled to some relief against the operation of the ordinance in question unless, of course, it is to be held that action under the statute of 1897 resulted in a loss of its rights.

The effect of granting partial relief, however, would be to give the ordinance an operation which it is inconceivable that the city council could have contemplated or intended.

If the ordinance cannot operate in the western division of Chicago and wherever the People's Company has itself laid pipes, it must be wholly void, for nothing can be more clear than the intention of the city council, as expressed in the ordinance, that it should operate in all parts of the city and upon the whole of the system of every gas company. Section 1 provides:

> "That *no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago* for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used."

Section 2 provides:

> "That *any company, corporation, person or persons who shall remove any meter or meters from the house, store, factory or premises of any consumer of gas in*

the city of Chicago, against the will and consent of any such consumer of gas who is willing to pay for gas furnished him, it or them by any such company, corporation, person or persons, and tenders the amount due at the price established and fixed in section 1 of this ordinance, shall be subject to a penalty of not less than twenty-five ($25) nor more than two hundred ($200) dollars for each and every offense."

And section 3 provides:

"That *any company, corporation, person or persons who shall, in violation of the provisions of the preceding sections, charge or require the city of Chicago, or any citizen thereof, or any consumer of gas therein*, to pay for gas furnished to it or them, or either of them, a sum in excess of seventy-five (75) cents per thousand cubic feet, or who shall furnish to the said city of Chicago, or any citizen thereof, manufactured gas less than twenty (20) candle-power shall be subject to a penalty of not less than twenty-five dollars ($25) nor more than two hundred dollars ($200) for each and every offense."

There could be no clearer case of judicial legislation than to hold that this intention, thus clearly and emphatically expressed, may nevertheless be disregarded, and the ordinance, by judicial interpretation, be made to operate only upon some persons in some parts of the city, as to which the ordinance might have been valid had the city council seen fit so to enact it. It would be wresting the ordinance from the purpose with which it was enacted, and making it serve a different purpose. *James* v. *Bowman*, 190 U. S. 127, 140.

There can, therefore, be no doubt that, if the city council had not assumed that the ordinance would operate uniformly, it would not have passed it, and would have done what it did a few weeks later, namely,

apply to the legislature for relief. To hold now that the ordinance is nevertheless to operate only in portions of the city, depending upon the history of the pipes through which the gas is supplied, would be to decree what the city council never intended to accomplish and would be judicial legislation beyond the power of any court. As Mr. Justice Matthews said in *Spraigue* v. *Thompson*, 118 U. S. 90, 95, in speaking of a statute which it was urged should be given partial effect—

> "But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

See also *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 636; *Johnson* v. *State*, 59 N. J. L. 535, 539; *State* v. *O'Connor*, 5 N. Dak. 629, 632; *Jones* v. *Memphis*, 101 Tennessee, 188, 195.

Moreover, is it reasonable to assume that the legislature, in authorizing consolidation or purchase, intended such consequences, or would have passed the act of 1897 in its present form with any such idea in its mind, particularly as it dealt with the very subject of gas prices? Surely, no one will seriously argue that the legislature intended that, if the People's Company acquired the plants and pipes of the other companies, its charges should vary so that it might demand one dollar from consumers supplied by its own plant and less than that price from consumers supplied by the

plants purchased under the act, varying as the city councils might change their views or exercise their discretion.

To sustain this ordinance, as far as concerns gas made and supplied from the factories and pipes which originally belonged to the companies other than the People's Company, while declaring it invalid as far as concerns gas made and supplied from the pipes laid by the People's Company itself, would require much investigation and involve peculiar judicial complications. The reason is that, owing to necessary changes and improvements, the People's Company has itself removed a great part of the original plants of these other companies and has substituted an improved plant in its stead, and that such of the original plants of these other companies as remains is so intermingled with the plant constructed by the People's Company (which, even before the consolidation, had power to carry on its business in any part of the city) that the gas made and supplied from the former plants cannot practically be separated from that made and supplied from the latter (record, p. 74). The demurrer concedes these facts. If this practical inconvenience result from purchase or consolidation, the sufficient answer must be that the legislature must be presumed to have contemplated the consequences of its enactment, and, so contemplating, to have dealt with the subject of rates in and by section 11 of the act of 1897.

Even if this were not so, and the streets and buildings supplied with gas from plants to which the city's power to regulate prices extended could be distinguished from other streets and buildings, the ordinance

would be void, because it would operate to establish two rates—the People's Company's rate of a dollar per thousand feet for gas supplied to certain streets and buildings, and the city's rate of seventy-five cents per thousand feet for gas supplied to certain other streets and buildings—without any ground for the distinction except that one street or building was supplied from one plant, and another street or building from another plant *of the same company.*

Such an ordinance, even if intended by the city council, would be utterly unreasonable. The regulation of prices for public service has a two-fold aspect: it is a rule of conduct for the public service corporation, and it affects the pockets of all citizens and corporations using the public service, and even of the city itself. As regards both the producers of gas and the consumers, such a regulation must be uniform in order to be reasonable. The legislature cannot be presumed to have intended to authorize any such unreasonable condition of affairs as different rates in the same city and varying according to the ownership or history of the pipes supplying the gas.

There is one vital difference between the power of taxation and the power to regulate prices. Taxation ought, as a matter of sound public policy, to be reasonable, but need not be so except in so far as the power of taxation has been limited by constitutions or statutes. State or municipal regulations of prices, on the other hand, *must* be reasonable and equal as to all, and if not so, they are void. Even in the case of taxation, uniformity is so desirable that the constitution of Illinois expressly requires it (art. IX, sec. 1). All the more,

then, must the regulation of prices (an exercise of a power much more limited than that of taxation) be uniform, if it is to be upheld as reasonable. An ordinance which says to one man, "you shall be supplied with gas at a price twenty-five per cent. less than your neighbor in the next street must pay," is utterly lacking in uniformity and reasonableness. It introduces local distinctions, and arbitrarily benefits certain parts of the city to the exclusion of the others. Such a result should never be permitted, especially when the legislature has ample power to regulate the subject and afford relief. No court of law or equity, it is submitted, should enter a decree which would have the inevitable result of establishing an ordinance of such a character, when it is inconceivable that the legislature ever intended to authorize or the city council ever intended to pass such an unequal and unreasonable provision.

IV.

THE JURISDICTION OF THE COURT BELOW AND OF THIS COURT TO DETERMINE THE QUESTION OF POWER OF THE CITY COUNCIL.

The learned court below declined to determine the question of the power of the city council to pass any ordinance regulating the price of gas on the ground that its jurisdiction did not extend to that question (record, p. 24). The reasoning by which this conclusion was reached, as set forth in the opinion, overlooked the authorities establishing the jurisdiction and duty of the court to decide the entire cause.

It is evident from the language of the opinion of the court below that it did not regard the allegations of the federal question as frivolous or fictitious or made for

the purpose of imposing upon the court, and that it did not decline jurisdiction upon any such ground. There is not the slightest suggestion that the suit was not one in good faith alleged to arise and actually arising under the Constitution of the United States. On the contrary, the court recognized as "fundamental that no city or state can constitutionally enact any legislation that impairs the validity of existing contracts" (record, p. 86), and, referring to the charter provision relied on as embodying an inviolable contract, said that "the interpretation of the clause is not free from considerable difficulty." Within the language of every decision on the subject, the presence of a substantial federal question invests the Circuit Court of the United States with jurisdiction to hear and determine not only the federal question but every other question involved in the controversy. *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 695; *Horner* v. *United States*, *No. 2*, 143 U. S. 570, 577; *In re Sawyer*, 124 U. S. 200, 220; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141; *Tennessee* v. *Davis*, 100 U. S. 257, 270; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; the case of *Omaha Horse Ry. Co.* v. *Cable Tramway Co.*, 32 Fed. Rep. 727, 729, decided by Mr. Justice Brewer, is on all fours; see also *Osborn* v. *U. S. Bank*, 9 Wheat. 738, at p. 821.

The city of Chicago insisted below and will insist in this court that it has legislative authority to pass the ordinance in question. It is that claim and that claim alone which creates and compels the pending litigation. A rule which would require the People's Company first of all to litigate the question of power in a state court

in order to determine whether the city was right or wrong in its assumption of power and then come into a federal court to litigate the federal question, would be most cumbersome and impracticable. The proper practice in such a case is clearly to bring the whole controversy into one suit, and if there be a *bona fide* federal ingredient and a claim actually arising under the Constitution of the United States, the suit may be brought in a federal court as a matter of constitutional right; and in that suit, the whole controversy should be determined once for all. *Interest reipublicæ ut sit finis litium.*

In its last analysis, the position of the defendant in the court below upon this point appeared to be that unless the appellant, People's Company, was prepared to concede the power of the city council to pass the ordinance in question, it could not sue in a federal court to protect its contract rights. This, it is submitted, is a novel doctrine, and would deprive the circuit courts of the United States of much of the jurisdiction intended to be conferred by the act of Congress. The contract right and its impairment being the fundamental and essential feature of the controversy, why should not the appellant have the right to invoke the jurisdiction and protection of the federal courts against the enforcement of an ordinance asserted to have been "passed under supposed legislative authority" and which the city is insisting is valid by virtue of legislation delegating the power and indisputably subsequent to the alleged contract? The jurisdiction of a circuit court was expressly sustained by this court in the analogous case of *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266, because there it appeared

"that the defendant grounded its right to enact the ordinance in question" upon supposed legislative authority embodied in an enactment subsequent to the alleged contract right. Of course, where the ordinance is obviously not of such a character as to impair the obligation of the contract at all, even conceding complainant's construction of the contract, as in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, or where the claim of a federal question clearly has no substance or foundation, as in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, a very different point is presented. See also *Sawyer* v. *Piper*, 189 U. S. 154, 156; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Swafford* v. *Templeton*, 185 U. S. 487, 493; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, 36; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345; *McCain* v. *Des Moines*, 174 U. S. 168, 181; *St. Joseph & Grand Island R'd* v. *Steele*, 167 U. S. 659, 662. But where the subject matter of the controversy is essentially federal, as the protection from impairment of the obligation of a contract, and the bill of complaint contains the proper allegations in legal and logical form (record, pp. 77–79, 82), a controversy arising under the Constitution of the United States is then presented, which is within the jurisdiction of a circuit court notwithstanding the fact that the federal question may ultimately be adjudged against the complainant. Such a "suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution." *Defiance Water Co.* v.

Defiance, 191 U. S. 184, 191. The jurisdiction, having once attached because of the fundamental federal ingredient, extends to every question which it may be necessary to decide in order to afford complete relief or to dispose of the entire subject matter of the controversy. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 564; *Ober* v. *Gallagher*, 93 U. S. 199, 206; *Ward* v. *Todd*, 103 U.S. 327, 329, and cases *supra*, p. 57.

As to the jurisdiction of this court, however, numerous decisions settle the proposition that, on a direct appeal from a circuit court under the act of 1891 "in any case that involves the construction or application of the Constitution of the United States," this court is not restricted to the consideration of the federal question but acquires jurisdiction of the entire case and of all questions involved in it. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Scott* v. *Donald*, 165 U. S. 58, 73; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105, 111; *Chappell* v. *United States*, 160 U. S. 499, 509; *Casey* v. *Houston, &c., Ry. Co.*, 150 U. S. 170, 181; *Horner* v. *United States, No. 2*, 143 U. S. 570, 577; *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 32.

It will, therefore, be assumed that the court below had jurisdiction and that it was its duty to decide the question of the power of the city council under the laws of the state of Illinois in view of the specific allegation of the amended bill of complaint that the ordinance had been passed unlawfully under claim of power (record, pp. 77-78). This being so, the question is clearly within the jurisdiction of this court to review and now determine.

V.

THE POWER TO REGULATE THE PRICE OF GAS HAS NOT BEEN DELEGATED BY THE LEGISLATURE OF ILLINOIS TO THE CITY COUNCIL OF CHICAGO.

Assuming that the benefit of the provision of section 3 of the act of 1865 has been in some way surrendered or lost and that the People's Company cannot avail of its protection even as to the gas supplied by it through its own plant and the mains and pipes laid under the ordinance of 1858, it is nevertheless submitted that the demurrer should have been overruled upon the ground that the ordinance of October 15, 1900, was void because the power to pass it has not been delegated to the city council by the legislature of Illinois.

In the court below, the supposed legislative authority of the city council was based upon two claims: the first being that the act of 1865 itself conferred the power without any limitation, and the other being that the power was conferred by certain provisions of the City and Village Act of 1872 under which the city of Chicago as now constituted was incorporated (Laws of Illinois, 1871-1872, pp. 227-234, 259; *Harmon* v. *City of Chicago*, 110 Illinois, 400, 411; *Chicago Packing and Provision Co.* v. *City of Chicago*, 88 Illinois, 221, 223).

The first proposition relied on by the city is somewhat difficult to state. We must confess that it is altogether too subtle for us to attempt to refute it, except so far as it refutes itself upon its face. The argument seems to be that the second clause of the provision in question must be regarded only as a restraint upon the legislature itself, leaving the first clause intact, and that by some process of reasoning about present and future

tenses and of supposed strict rules of statutory construction, the statute must be made to read as if the portion italicized below had never been enacted, viz:

> "Ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by the said company for gas; *but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet.*"

In other words, the contention of the city is that the legislature intended to grant to the city council unlimited power, and that the second clause meant nothing at all *as to the present* and should be treated as a nullity!

The second claim on the part of the city arises under the general grants of power to city councils to be found in the said City and Village Act of 1872 quoted below.

In determining the existence or non-existence of a particular municipal power, it is proper always to bear in mind, as stated by the Supreme Court of Illinois in *City of Chicago* v. *Blair*, 149 Illinois, 310, 318, that—

> "The tendency of municipal government to arrogate to itself power and to encroach upon the rights of the citizen has led to the establishment of the statutory rules of construction limiting its powers to those expressly granted, or arising, by reasonable and necessary implication, from the grant."

Such special statutory rules of construction are the result of fundamental principles established in the law of municipal corporations, which guide the courts in determining the powers of such corporations. The reasonableness, the necessity, and the salutary character of

these principles have often been indicated in judicial opinions, and, of course, are presumed to be familiar to the legislature in framing its statutes.

In the case of *Barnett* v. *Denison*, 145 U. S. 135, 139, Mr. Justice Brown, delivering the unanimous opinion of the court, said:

> "It is the settled doctrine of this court that municipal corporations are merely agents of the state governments for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted."

This principle was reiterated in the strongest language at the present term in *Atkin* v. *Kansas*, 191 U. S. 207, 220.

And such is the settled doctrine in Illinois. Thus, in the recent case of *Coquard* v. *Village of Oquawka*, 192 Illinois, 355, 365 (1901), the court said:

> "This court, as well as the Supreme Court of the United States, has quoted with approval the rule laid down by Judge Dillon in his work on Municipal Corporations, that 'a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient but indispensable.' (*Cook County* v. *McCrea*, 93 Ill. 236; *Huesing* v. *City of Rock Island*, 128 *id.* 465; *Merrill* v. *Monticello*, *supra*[1].) 'Any reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' See, also, *Marsh* v. *Fulton*, 10 Wall. 676; *Ottawa* v. *Carey*, 108 U. S. 110; *Jonesboro* v. *Cairo*, 110 *id.* 192; *Kelly* v. *Milan*, 127 *id.* 139."

[1] 138 U. S. 673, 681.

In *Kiel* v. *City of Chicago*, 176 Illinois, 137, 141, the court said:

> "The power to pass an ordinance and impose a penalty for its violation is to be strictly construed, and is not to be extended, by implication, to persons or things not expressly within the terms of such power."

And in *Smith* v. *McDowell*, 148 Illinois, 51, 62, the court said:

> "These municipal corporations are instrumentalities of the state, exercising such powers as are conferred upon them in the government of the municipality. Their power is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred."

See also *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 598; *Citizens' St. Ry.* v. *Detroit Railway*, 171 U. S. 48, 53; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 64 Fed. Rep. 628, 639; 22 U. S. App. 570, 590; *Old Colony Trust Co.* v. *City of Atlanta*, 83 Fed. Rep. 39, 44, affirmed 88 Fed. Rep. 859; *Cleveland City Ry. Co.* v. *City of Cleveland*, 94 Fed. Rep. 385, 396; *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27; *Town of Drummer* v. *Cox*, 165 Illinois, 648, 650; *City of Chicago* v. *McCoy*, 136 Illinois, 344, 353; *Seeger* v. *Mueller*, 133 Illinois, 86, 94; *Emmons* v. *City of Lewistown*, 132 Illinois, 380, 384; *Huesing* v. *City of Rock Island*, 128 Illinois, 465, 477; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 51; *City of Noblesville* v. *Noblesville Gas, etc., Co.*, 157 Indiana, 162, 167; *Muncie Natural Gas Co.* v. *City of Muncie* (Ind. 1903), 66 N. E. 436, 438; *In re Pryor, Petitioner*, 55 Kansas, 724, 727; *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 628; *Wabaska*

Electric Co. v. *City of Wymore*, 60 Nebraska, 199, 202; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255, 259; *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, 291; *State ex rel. Telephone Co.* v. *City of Sheboygan*, 111 Wisconsin, 23, 38.

In the light of these established principles, we may now analyze the statutory provisions relied on by the city of Chicago as conferring the power to fix or regulate the price of gas.

A.

It has never been contended on the part of the city of Chicago that the City and Village Act of 1872 conferred the power to fix the maximum price of gas in express terms. The only claim that has been advanced is that the power must be implied as incident to the following powers expressly granted to the city councils, viz.: (1) to provide for the lighting and to regulate the openings in streets, the erection of gas factories and the laying down of pipes, and (2) to regulate the police of the city and to pass and enforce all necessary police ordinances. These powers are conferred in and by the *eleventh*, *thirteenth* and *sixty-sixth* subdivisions of section 1, article V, of the City and Village Act of 1872, *supra* (1 Starr. & C. Ann. Stat. 2d ed., pp. 689, 694, 695, 707; pamphlet, pp. 7, 8, 14), which read as follows:

> "§ 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: . . .
>
> "*Eleventh.*—To provide for the lighting of the same [streets]."

"*Thirteenth.*—To regulate the openings therein [in streets] for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *Provided, however*, that any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

"*Sixty-sixth.*—To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

The precise question of the power of city councils to regulate the price of gas has never been decided by the Illinois courts;[1] but the history of the subject and the contemporaneous and long continued interpretation of the city of Chicago itself, as well as the decisions in analogous cases, are most convincing against the claim that the legislature ever intended to delegate the power. It is submitted that it would overturn all the rules heretofore supposed to be settled as to the powers of municipal corporations to hold that such a power to regulate prices, one of the greatest and most far-reaching of all the powers of government, was to be implied from the grant of other powers. The language of such grants will not be

[1] The point was not involved or decided in the recent decision in the *quo warranto* proceedings. See pamphlet, p. 52.

broadened by implication so as to permit any interference with the management by a private corporation of its property not within the clear letter of the statute. *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 248.

From the time of the organization of the People's Company in 1855 until the year 1881, the city council does not seem to have ever conceived or entertained the idea that it had any power to fix or regulate the price of gas. During the year 1881, however, a proposed ordinance was framed entitled "An ordinance concerning gas companies," which was intended to license manufacturers of gas, to provide for its illuminating quality, and to regulate the charge therefor. This proposed ordinance was submitted by the city council to the corporation counsel then in office, Mr. Francis Adams, for his opinion, and on the 18th of October, 1881, he furnished an opinion to the effect that the council was without power to pass the ordinance. The opinion is printed at length in a book entitled "Opinions of the corporation counsel and assistants from January, 1872, to March, 1897," which was officially published in the latter year "by direction of the city council under the supervision of the corporation counsel," Mr. William G. Beale. The opinion of corporation counsel Adams was to the effect that the city council was "powerless to pass the bill" because the power had not been conferred by the legislature. It will be found printed at length at pages 41–42 of this official publication, and a copy is contained in the pamphlet filed with this brief at page 31 for convenience of reference.

This opinion of the corporation counsel was ac-

cepted as conclusive and was acquiesced in until 1890, when the city council again asked the opinion of the corporation counsel "as to the right of the city to regulate the price to be charged by the various gas companies, doing business in the city of Chicago, to the consumers of their product." An opinion was then furnished by the legal department of the city of Chicago signed by Mr. C. S. Darrow, assistant corporation counsel, in which the question was discussed at length. The conclusion reached was that the existence of the power was so exceedingly doubtful that it would be ill advised for the city council to attempt to exercise it. The opinion is printed at length in pages 147–149 of the official compilation above cited, and for convenience of reference is printed at length in the pamphlet filed with this brief.

In September, 1888, Mr. John W. Green, corporation counsel, furnished an opinion to the financial committee of the city council of Chicago upon the analogous question of the power to fix the rates to be charged for telephones. The opinion was against the existence of any such power in the city council, and among other things, Mr. Green said:[1]

> "It cannot be seriously contended that the express power to regulate the rates to be charged for telephones is embraced within the express charter powers of the city council."

In November, 1896, when Mr. William G. Beale was corporation counsel, he was asked for his opinion in regard to the power of the city council to fix telephone

[1] Official publication, pp. 111–115; pamphlet, pp. 38, 39.

rates, and rendered a very comprehensive opinion in which, among other things, he said:[1]

> "I think it is clear that the city of Chicago has no power to regu[illegible] telephone charges and rates."

The city council of Chicago again agitated the subject in 1899, when the corporation counsel then in office, Mr. Walker, was asked to furnish an opinion to the city council on the same subject, which was done under date of May 26, 1899, and which is also printed at length in the pamphlet submitted herewith. Mr. Walker, in that opinion, among other things, said:[2]

> "Until the recent cases of *Rogers Park Water Company* v. *Fergus*, 178 Ill. 571, and *People* v. *Suburban R. R. Co.*, 178 Ill. 594, I should have had, as already indicated, no hesitation in finding that a city council possesses no legal right to regulate the price of gas, except in those cases where the regulation is inserted in an ordinance as a condition to the grant of a franchise to the gas company. . . . The most that can be said is that I believe it doubtful that the Supreme Court would go to the extent, in a case directly in point, of holding that this power exists."

The cases mentioned by Mr. Walker do not warrant any doubt as to what the Supreme Court of Illinois would hold upon the question of the power of the city council to fix the price of gas. The most that can be said of the *Rogers Park* case, as an indication of what that court would hold, is that it recognizes the power of the *state*, to be exercised through its legislature or through a *duly authorized* municipality, to fix reasonable water rates; and the *Suburban* case merely adjudges the power of the city to exact a contract from a

[1] Official publication, pp. 320, 322; pamphlet, pp. 44, 46.
[2] Pamphlet, p. 49.

street railway company as a condition to the grant of the original consent. The appellant in the case at bar conceives that it would hardly require the authority of the *Rogers Park* case to reinforce so settled a proposition as that the legislature may, directly or through a duly authorized municipality, regulate gas or water rates when not restrained by constitutional or contractual provisions. And there is no difficulty in conceding the soundness of the established rule that the city could originally have stipulated for a fixed rate as a condition of its consent without in any way affecting the contention that, after the consent had been granted and an immense capital invested on its strength, the city council had no power to change or add to that consent and fix rates or charges in the absence of specific legislative authority. *People* v. *West Division Ry. Co.*, 118 Illinois, 113, 119; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 384. But this has nothing whatever to do with the question at bar, *i. e.*, whether such authority has in fact been delegated to the city council of Chicago. Indeed, even if it could be supposed that the effect of the language of the Supreme Court of Illinois in the *Suburban* case on page 606 was to place the question of municipal power in doubt, nevertheless the language is plainly *obiter dictum*, as admitted by Mr. Walker in his opinion, and, as such, is without binding effect either upon a federal or a state court[1], and would still leave the existence of

[1] *Carroll* v. *Lessee of Carroll*, 16 How. 275, 286, 287; *Lockhard* v. *Asher Lumber Co.*, 123 Fed. Rep. 480, 501; *Matz* v. *Chicago & A. R. Co.*, 85 Fed. Rep. 180, 183; *Mayer* v. *Erhardt*, 88 Illinois, 452, 457; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 574.

this power concededly doubtful. It follows, therefore, in view of the established rule that doubts concerning the existence of power in a municipal corporation are to be resolved against the municipality[1], that Mr. Walker's candid expression of a doubt was equivalent to a denial of the existence of the power. Thus, the Supreme Court of Illinois, in the case of *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27, decided in June, 1902, since the adoption of the ordinance in question, used the following language:

> "The court [referring to the case of *Emmons* v. *City of Lewistown*, 132 Ill. 380, 384, *supra*], correctly remarked that to concede that it was doubtful whether the legislature had granted such power was to deny the existence of the power."

And in *Seeger* v. *Mueller*, 133 Illinois, 86, the court had said (p. 94):

> "Any fair, reasonable doubt concerning the existence of any power is resolved against the corporation, and the power is denied."

So, in *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 494, this court in denying that Congress had empowered the Interstate Commerce Commission to fix transportation rates, among other things, said:

> "The question debated is whether it vested in the commission the power and the duty to fix rates; and the fact that this is a debatable ques-

[1] *Minturn* v. *Larue*, 23 How. 435, 436; *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, 53; Dillon, Municip. Corp., 4th ed. § 89; *Seeger* v. *Mueller*, 133 Illinois, 86, 94; *Emmons* v. *City of Lewistown*, 132 Illinois, 380, 384; *Coquard* v. *Village of Oquawka*, 192 Illinois, 355, 365; *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 51; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255, 259.

> tion, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied."

And, in *City of Ft. Scott* v. *W. G. Eads Brokerage Co.*, 117 Fed. Rep. 51, 54, the Circuit Court of Appeals for the eighth circuit, Sanborn, C. J., delivering the opinion of the court, among other things, said:

> "Municipal corporations are the creatures of the statutes under which they are organized and operated. By those statutes their powers are granted, measured and limited. Beyond the limits of the powers there expressly granted and those fairly implied therefrom or incident thereto, they cannot lawfully act or agree to act, and a fair and reasonable doubt of the existence of a corporate power is fatal to its being."

Moreover, since the rendition of the opinion of Mr. Walker and the passage of the ordinance in question, the city council has recognized its lack of power by applying to the legislature for express authority to regulate the price of gas. On January 21, 1901, three weeks after the ordinance in question would have gone into effect but for the restraining order of the court below issued in the present case, a special committee of the city council on state legislation reported the draft of an act to be submitted to the legislature, which is printed at length in the pamphlet filed with this brief. This proposed act was submitted to the legislature, but that body declined to pass it. This proof certainly furnishes some evidence that the city regarded itself as without power to fix the price of gas or, at least, that it considered the existence of such power to be doubtful.

The opinions of the corporation counsel of the city

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of Chicago are entitled to more weight than the ordinary advice of counsel. His office is created by law, he is the head of the law department of the city, and it is his statutory duty, when called upon, to furnish written opinions for the guidance of the mayor, the city council and every department of the municipal government.[1] Under such circumstances, these opinions, construing a statute relating to the powers of the city, are and ought to be of the highest authority, in the absence of a judicial decision on the exact point. With regard to a doubtful question, as this concededly is, where the authorities charged with the administration of the law have accepted the construction of the corporation counsels as the true one and acquiesced therein for a long period and large property interests have undoubtedly relied upon such action, their conclusions ought to be adopted as resolving the doubt against the existence of power.

In *People* v. *Kipley*, 171 Illinois, 44, 77, an opinion of the corporation counsel of the city of Chicago construing a doubtful statute relating to all other cities in the state as well as Chicago, "for a long series of years unchallenged," was adopted by the Supreme Court of Illinois as the true construction.

So, in *People* v. *Fidelity and Casualty Co.*, 153 Illinois, 25, action by an administrative department of the state of New York upon the advice of its attorney general was accepted as a sufficient showing that the law of New York was in accordance with such action. Mr. Justice

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[1] Charter of 1863, c. III., § 7, L. 1863, p. 50; City and Village Act, Art. VI., §§ 2, 3, L. 1871–1872, pp. 236, 237; Mun. Ord., 1881, p. 192, 1890, p. 428, 1897, vol. 1, p. 15.

Baker, who delivered the opinion of the court, states the general rule in cases of contemporaneous exposition as follows (p. 39):

> "In construing statutes, the rule that contemporaneous exposition is strongest in the law is to be regarded (*Phœbe* v. *Jay*, Breese, 268; *Isaacs* v. *Steel*, 3 Scam. 97; *Russel* v. *Rumsey*, 35 Ill. 362). Where the execution of statutes is confided to a particular department of the government, the court will regard, and in doubtful cases adopt, the construction acted on by such department (*Mathews* v. *Shores*, 24 Ill. 28; *Isaacs* v. *Steel*, *supra*). And if the construction is doubtful, long continued action upon a particular construction may reduce the uncertainty to a fixed rule. *Comstock* v. *Cover*, 35 Ill. 470."

This is the universal doctrine. It has been frequently applied by this court to contemporaneous expositions by various administrative departments of the federal government. *Potter* v. *Hall*, 189 U. S. 292, 298, 300; *Southern Pacific Railroad Co.* v. *Bell*, 183 U. S. 675, 682, 685; *Hewitt* v. *Schultz*, 180 U. S. 139, 156, 157. The opinions of the attorneys general of the United States have repeatedly been referred to as more or less authoritative in the construction of federal statutes relating to the powers and duties of the federal administrative officers. *Helwig* v. *United States*, 188 U. S. 605, 614–615; *United States* v. *Ranlett and Stone*, 172 U. S. 133, 140; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 692.

B.

Apart, however, from the effect of contemporaneous exposition, which the Supreme Court of Illinois has declared to be "strongest in the law," the existence of

power in the city council of Chicago to fix the price of gas does not exist according to the established rules of statutory construction. These rules, which have heretofore guided the courts in such matters, ought not to be lightly disregarded. As Mr. Justice Bradley so well said in *Merritt* v. *Welsh*, 104 U. S. 694, 702:

> "It is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used."

An analysis of the City and Village Act of 1872 will show conclusively that the legislature did not intend to delegate to the city council the power to regulate the rates or prices of gas companies. Subdivision eleventh of section 1 of the City and Village Act of 1872, merely grants power to provide for the lighting of streets; subdivision *thirteenth* confers municipal power in general terms to *regulate* the openings in streets for various purposes, and provides for the right to erect gas factories and lay down pipes in the streets or alleys of any city or village "subject to such regulations as any such city or village may by ordinance impose," and subdivision *sixty-sixth* confers municipal power in general terms "to *regulate* the police of the city or village, and pass and enforce all necessary police ordinances."

The scheme of the act of 1872 was to provide a general statute covering the incorporation of cities and villages and dealing in a comprehensive form with the powers to be exercised by them. Certain specific

powers were delegated to the city council in cities, including the power to provide for lighting the streets and opening them for laying of gas or water mains or pipes, and there was granted to any company theretofore or thereafter organized under general laws the right, by consent of the common council, to erect factories and lay down pipes in the streets or alleys of any city subject to such regulations as any city might by ordinance impose.

In *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471, it was pointed out that this power to fix rates was not incident to a power to regulate the use of streets, Mr. Justice Brewer saying:

> "The relation of a telephone or telegraph company to its patrons, after the use of the streets has been granted, does not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons."

The statute expressly dealt with the subject of delegating to city councils the power to regulate the rates or charges of those engaged in various businesses, but it omitted any delegation of power to regulate the price or charges of gas. Thus, the express power was delegated to city councils—

1. "To fix the rate of wharfage and dockage" (Art. V, subdiv. 36).
2. "To prescribe the compensation" of hackmen, omnibus drivers "and all others pursuing" like occupations (subdiv. 42).[1]
3. "To establish ferries, toll bridges, and license and regulate the same, and, from time to time, fix tolls thereon" (subdiv. 87).

[1] This has been construed to include street cars. *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, 519.

4. "To authorize any person or private corporation to construct and maintain [water works] at such rates as may be fixed by ordinance" (Art. 10, subdiv. 1).

These provisions are found in the same statute of which the provisions now claimed impliedly to authorize the fixing of the price of gas constitute a part.[1] Indeed, they are all subdivisions of the same section which purports to enumerate the powers of cities and villages in the state,[2] except the provision as to waterworks, which will be found in a subsequent article of the same statute.[3]

It, therefore, appears that the legislature was familiar with the terms usually employed in authorizing a municipality to fix rates and charges. Manifestly, if it had intended to confer power to fix the price of gas, it would have done so when the subject of gas was under consideration, by the use of the same exact and simple language deemed by it necessary for that purpose in the case of hackmen, wharves, docks, ferries, toll bridges and waterworks. As Mr. Justice Brewer said, in *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 495, speaking of the power to regulate rates:

> "The language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."

It is, therefore, reasonable to assume that the legislature deemed it necessary to confer the power to fix

[1] City and Village Act, L. 1871–1872, p. 218.

[2] § 1 of art. V, subds. 11th, 13th, 16th, 42nd, 66th, 87th, p. 227 *et seq.*

[3] § 1 of art. 10, p. 259.

rates by express words, as it did in the case of hackmen, wharves, docks, ferries, toll bridges, and waterworks, and that its omission of any grant of such power in respect of gas and other public utilities is of conclusive significance, and precisely as if it had declared that it would not grant the power? The case of *City of Cairo* v. *Bross*, 101 Illinois, 475, 478, would seem to be exactly in point. The court, by Mr. Justice Mulkey, there said:

> "When the legislature, by the general incorporation act, declares that the corporate authorities of cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration must, by a familiar canon of construction, be construed precisely as if the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. In discussing this principle, the Supreme Court of the United States, in *Thomas* v. *West Jersey Railroad Co.*, 101 U. S. 82, says: 'Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.'"

In *C. & N. W. Ry. Co.* v. *City of Chicago*, 148 Illinois, 141, 159, the court quotes with approval the following from Endlich on Interpretation of Statutes, sec. 399:

> "Where there is in the same statute a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enact ment must be taken to affect only such cases within

its general language as are not within the provisions of the particular enactment."

And in *Kiel* v. *City of Chicago*, 176 Illinois, 137, 140, the court expressly limited one of the very provisions now in question, namely, clause 66, conferring power to pass police ordinances, and said:

> "The powers conferred by the last two clauses are express powers specifically enumerated, and by a familiar canon of construction it will be presumed the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. The principle is, that a power may be fairly implied as to police, but where a power is expressly enumerated in the charter of a corporation that is the measure thereof, and the enumeration of such power implies the exclusion of all others. *City of Cairo* v. *Bross*, 101 Ill. 475; *Huesing* v. *City of Rock Island*, 128 *id.* 465. Clause 66, having reference to authority to pass police ordinances, does not extend the express power conferred by the provisions of clause 91."

The point now being discussed arose in *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, as to water and gas regulation, and the principle of construction so firmly established by the Illinois decisions was applied. It was held that no power existed in the municipality to fix the price of gas, the court, by Scott, J., saying (p. 293):

> "It is worthy of note that the legislature thus, in two paragraphs relating to kindred subjects, expressly conferred the power to fix the price of water, and withheld it as to gas or other light, *thus limiting the power over purveyors of gas to 'regulation.'* . . . It is sufficient to say, however, that the legislature having passed a general law upon the particular subject, the power to fix such rates must be found therein, if at all."

So, in *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 632, holding that the general police power to "regulate" telephones and telephone companies, did not include the power to fix maximum telephone rates, the court, by Black, J., said:

> "To say that under this general power the city may fix rates for telephone services would be going entirely too far. *This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges.*"

This power over prices does not seem to meet any of the tests of implied powers (Dillon's Mun. Corps., sec. 89, already cited), but is a power which stands by itself, and may be granted or not as the legislature may see fit, being so essentially distinct from other powers that it cannot be granted by implication.

In *City of St. Louis* v. *Bell Telephone Co., supra*, 96 Missouri, 623, 629, the court, by Black, J., said:

> "The city places some reliance on its general power to regulate the use of the streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. *Ferrenbach* v. *Turner*, 86 Mo. 416. The erection and maintenance of telephone poles is one of these new uses; and is a proper use of the streets. *Julia Building Ass'n* v. *Bell Telephone Co.*, 88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant.
>
> Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone

charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground."

See also *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471, *supra*.

In *State* v. *Sheboygan*, 111 Wisconsin, 23, 38, 39, the court, by Bardeen, J., said:

> "The fixing of maximum charges for use of telephones or service in the city is said to be a lawful police regulation to prevent extortion. This is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. Such power is inherent in the state, and is a necessary attribute of sovereignty. . . . The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There was not the remotest relation between them. The attempt of the city to justify its position on that ground must fail."

So, in the case of *In re Pryor, Petitioner*, 55 Kansas, 724, it was held that a municipality did not have the power to fix maximum gas rates under a general grant of power to regulate, and the court, by Martin, C. J., said (pp. 724, 728, 729):

> "In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication. . . . Under the section of our statute hereinbefore fully quoted, a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and *under such regulations as they may prescribe;* but the

regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes and supplied to consumers."

In *Old Colony Trust Co.* v. *City of Atlanta*, 83 Fed. Rep. 39 (affirmed 88 Fed. Rep. 859), District Judge Newman said (pp. 43, 44):

> "First, the power of 'regulation' does not necessarily embrace the power to fix rates of charge. There are many matters for it to cover without embracing this latter power. The city unquestionably has the right, within any reasonable limit, to regulate the speed of cars and other matters connected with their movement on the streets; where poles shall be placed in the case of overhead wires; how wires shall be located, and their location with reference to other wires and the safety of the same; and to do many other things which might be noted with reference to the occupancy of the streets, protection to life and limb thereon, and all such matters as involve the safe and orderly use of the streets over which it has, under the legislature, full power and control. . . . We hold, moreover, that, before the city can exercise the power to fix rates of fare for a street-railroad company, it must obtain that power in express terms, or it must arise by necessary implication from the words used in the legislative act. The power of the state over the subject-matter need not be discussed. We are dealing with the power of a municipality, a creature of the legislature, which derives all its authority from the legislature, and can only act within the limits of the legislative grant."

In *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 52, the court held that a legislative grant of authority to a municipality to provide "regulations for the safe supply, distribution and consumption of natural gas" did not confer power to fix the price of such gas, and unan-

imously overruled the contrary decision in *Rushville* v. *Rushville Natural Gas Co.*, 132 Indiana, 575, 584, rendered the year before by a divided court. In its opinion in the *Lewisville* case, the court quoted the rules of construction for the ascertainment of municipal powers as laid down by Judge Dillon and approved by the Supreme Court of Illinois in numerous cases, and added (p. 52):

> "There is not a word or a syllable to be found in this act indicating that the general assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and quite a different thing. In our opinion, it was not the intention of the general assembly to confer, by the act above set out, the power to regulate the price at which natural gas should be furnished. It follows that the conclusion reached in the case of the *City of Rushville* v. *Rushville Natural Gas Co.*, *supra*, was erroneous and should be overruled."

The *Lewisville* case has ever since been followed in Indiana without dissent; and the rule that the power to fix the price of gas is not to be included in a general provision conferring municipal power to regulate is firmly established in that state. *City of Noblesville* v. *Noblesville Gas, etc., Co.*, 157 Indiana, 162, 166; *Muncie Natural Gas Co.* v. *City of Muncie* (Ind. 1903), 66 N. E. 436, 438; *Rushville Nat. Gas Co.* v. *Morristown* (Ind. App. 1903), 66 N. E. 179, 181.

In *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255 (1902), statutory power of a city "to make ordinances, by-laws, rules and regulations, not inconsistent with the constitution and laws of the common-

wealth, for the maintenance of the peace, good government and welfare of the city, and its trade, commerce and manufactures" (which power was said by the court to be "but a defined statement of the police power of any municipality") was held not to include the power to fix rates for water to be supplied by a water company.

To the same effect are *State ex rel. City of St. Louis* v. *Laclede Gas Light Co.*, 102 Missouri, 472, 486; *Wabaska Electric Co.* v. *City of Wymore*, 60 Nebraska, 199, 202; *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, 293; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 64 Fed. Rep. 628, 639; *Cleveland City Ry. Co.* v. *City of Cleveland*, 94 Fed. Rep. 385, 396. And a diligent search has failed to disclose the decision of any court to the contrary.

The case of *Commonwealth* v. *Gage*, 114 Massachusetts, 328, is not, as the head note may seem to indicate, authority for the proposition that municipal power to fix a maximum fare for the carriage of persons in hackney carriages may be derived from a simple grant of authority contained in the Massachusetts General Statutes, c. 29, § 14, "to make regulations for carriages." An examination of that section together with other authorities cited in the opinion, shows that there could have been no intention of basing the municipal power to fix the rates of hackney coachmen on that provision alone. The power which the city of Boston exercised had been expressly and unequivocally conferred upon it by statute, and this source of its power must have been in the mind of the court when its short opinion was rendered. The statute was probably so familiar to court and counsel that there was no occasion to refer to it at length in the opinion, and

no question as to the sufficiency of municipal authority appears to have been raised or discussed. The section of the General Statutes referred to in the opinion (section 14 of c. 29) expressly recognizes as unimpaired "the right of a city to make by-laws relating to the same subject." The opinion also refers to *Commonwealth* v. *Stodder*, 2 Cush. 562, 574, and *Commonwealth* v. *Duane*, 98 Massachusetts, 1. In the latter case, the existence of sufficient municipal authority was assumed without reference to the statute conferring it. In the former case, however, the authority of the city to regulate hackney coachmen under the statute of 1796, c. 32, is cited, section 6 of which act reads in part as follows:

> "And be it further enacted, that a major part of the selectmen be authorized and empowered to make such rules and regulations, establishing the rates and prices to be paid for the carriage and conveyance of persons in said hackney coaches within the limits of the town of Boston, as they may from time to time judge reasonable, regard being had to the time and distance."

This power of the selectmen was not abrogated by the charter of the city of Boston (Mass. L. 1821, c. 110) enacted pursuant to the second article of amendment to the Massachusetts Constitution, adopted in 1820. On the contrary, section 13 of the charter expressly confirms and reinvests all of the pre-existing powers of the selectmen "in the mayor and aldermen, as hereby constituted, as fully and amply as if the same were herein specifically enumerated." The effect of the city charter was only to change the form, not the powers, of the city government. *Hill* v. *Boston*, 122 Massachusetts, 344, 356.

To avoid misunderstanding, it should be emphasized

that the power here referred to is a power to *regulate* charges, *i. e.*, to establish at any time what they shall be, or what they shall not exceed. This is totally distinct from a power to fix charges as a condition of the grant of the right to occupy or tear up the streets, or to prosecute any business within the municipal limits. Where a municipality has exclusive control over its streets, it may grant rights in them upon such reasonable terms as it may see fit, including a limitation on the charges which the party using the streets may require the public to pay for the services rendered. Such a limitation of charges is merely an exercise of the contractual powers of a municipality, and has nothing whatever to do with its police power, or with any power analogous thereto. *People* v. *Suburban R. R. Co.*, 178 Illinois, 594, 604; *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 420; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 593, 598; *Decatur Gas Light Co.* v. *City of Decatur*, 120 Illinois, 67, 68.

The decisions in *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, and the *Water* cases, so-called (*City of Danville* v. *Danville Water Co.*, 178 Illinois, 299; 180 Illinois, 235; 186 Illinois, 326; 180 U. S. 619; *Rogers Park Water Co.* v. *Fergus*, 178 Illinois, 571; 180 U. S. 624; *Freeport Water Co.* v. *Freeport*, 186 Illinois, 179; 180 U. S. 587), which will probably be relied on by counsel for the city as opposed to the contention of the appellants, in reality tend most strongly to sustain it. In the *Traction* case, it was held that two subdivisions of the same section of the City and Village Act conferring power (*forty-second*) " to license, tax and *regulate* hackmen, draymen,

omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, *and to prescribe their compensation*," and (*ninety-sixth*) " to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted," conferred authority to fix maximum street car fares. A careful consideration of the statutory provisions involved in that case will show that the legislature fully understood the limited scope of a general municipal power to *regulate* and clearly expressed its intention that such power should have only limited scope and should not include power to fix maximum charges. This is apparent when it is appreciated that, after conferring the general powers " to license, tax and *regulate*," the legislature, in order to confer power to fix maximum charges, deemed it necessary to add the words, *and to prescribe their compensation.*

In the *Water* cases, it was held, among other things, that section 1 of article 10 of the City and Village Act (1 Starr & Curt. Ann. Stat., 2d ed., p. 786) conferring municipal power " to authorize any person or private corporation to construct and maintain the same [water works] *at such rates as may be fixed by ordinance*, and for a period not exceeding thirty years," was sufficient to authorize the fixing of maximum water rates by various municipalities throughout the state. The decision on this point in each case was based solely upon the plain expression, " such *rates* as may be fixed by ordinance," certainly not upon any implication from the general power to regulate water works and water companies or to pass and enforce police ordinances found elsewhere in the same statute. 178 Illinois, 311–312; 180 U. S. 587, 593, 601.

Not only has the legislature thus by conferring power to fix rates other than gas rates expressed its intention to withhold the power to fix gas rates, but it has even more directly expressed that intention by its special action on the subject of gas rates.

The act of February 7, 1865 (1 Pr. L. 1865, pp. 589, 590), amending the charter of the People's Company, contained the following provision (record, pp. 27, 28):

> "But ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

This is a plain statement of the legislative will as to the extent of the power of the city council to regulate the gas rates of the People's Company; that is, it was given the power to regulate such rates above three dollars per thousand feet, but below that price the city was to have no power of regulation as to rates. And in the so-called Consolidation Act of 1897 the legislature prescribed not only the price to be charged by the consolidated corporation but the quality of the gas.

This special legislation having particular application to the subject of gas rates is not in any way repugnant to the general provisions of the City and Village Act of 1872, and should, therefore, control. In the present case, as we have seen, every reasonable hypothesis would exclude from the general powers of regulation the power to regulate gas rates. And yet, to hold that these general provisions conferred power to fix the price of gas at seventy-five cents per thousand

feet would necessarily involve a holding that the prior special grant of power to regulate gas rates above but not below three dollars per thousand feet was in some way impliedly repealed and that the subsequent enactment in 1897 was subject to nullification by action of a city council. Such a holding would be contrary to the plainest principles of statutory construction and directly at variance with repeated decisions of the Supreme Court of Illinois.

In *City of East St. Louis* v. *Maxwell*, 99 Illinois, 439, 444, the court, referring to the effect of the City and Village Act, said:

> "The act of 1872 is a statute of a general nature, and such statutes do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities. Dillon on Municipal Corporations, sec. 54."

And in *Village of Hyde Park* v. *Oakwoods Cemetery Asso.*, 119 Illinois, 141, 148, the court said:

> "The act conferring the powers on the association was special, and under the rule announced, was not abrogated by the general law. The act of 1872 confers general power to lay out and vacate roads and streets, on cities and villages, within their corporate limits; but within the village of Hyde Park, by special act, the association had previously been authorized to acquire certain lands for a public purpose, and such lands, by the terms of the act, were not liable to be taken for road purposes. The two acts may stand together."

To the same effect, see *People* v. *Murphy*, 202 Illinois, 493, 496; *People* v. *Brown*, 189 Illinois, 619, 622; *Village of Ridgway* v. *Gallatin County*, 181 Illinois, 521, 526; *Trausch* v. *County of Cook*, 147 Illinois, 534, 537; *Gunnarssohn* v. *City of Sterling*, 92 Illinois, 569, 573; *Cov-*

ington v. *City of East St. Louis*, 78 Illinois, 548, 553; *Town of Ottawa* v. *County of La Salle*, 12 Illinois, 339, 341.

In any event, the *thirteenth* subdivision was not intended to authorize a regulation applicable to the People's Company, for that company was organized and exists under and by virtue of special acts, whereas the application of the provision in question to companies then existing is expressly confined to companies "organized under the *general* laws." The most that can be said of the power of regulation granted by this *thirteenth* subdivision is that "the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys" therein conferred upon companies theretofore "organized under the general laws of this state" should be subject to "such regulations as any such city or village may by ordinance impose." Such a power of regulation must clearly be confined to the subject matter of that clause.

C.

There only remains to consider the provision of the *sixty-sixth* subdivision of section 1 of article V of the act of 1872, which reads as follows:

> "To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

It would surely be an extraordinary stretch of language to hold that this general grant to the city council of power to regulate the police of a city and to pass and enforce necessary police ordinances was intended by the

legislature to invest the city council with the governmental power of regulating rates. The statute does not delegate to the city council general police power but simply power to pass and enforce 'necessary police ordinances.' There must needs be a vast difference between a grant of power to regulate the police of a city or village and to pass police ordinances and a delegation of the 'police power' of a state. Speaking of the latter, Mr. Justice Harlan said, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661: "In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government."

The consequence of now holding that a grant of power to pass and enforce all necessary police ordinances covered a power to regulate the price of gas, water, telephones, electric lights, warehousemen, etc., etc., would be a great deal more than merely sustaining this particular ordinance. It would necessarily involve holding that the provision quoted was intended to grant to the smallest village as well as to the largest city unlimited police power, as absolute as that of the state itself according to the broadest view of police power that has ever been taken; for, if the phrase 'necessary police ordinances' covers the regulation of the price of gas, it must also cover not merely the regulation of prices for all other public services, but the regulation of all other acts except those relating to taxation and finance. In fact, if clause 66 could receive the interpretation now contended for by the city, all but four or five of the other ninety-five clauses in article V would be superfluous. In order

to sustain the city's contention, a rule of statutory construction hitherto unknown in jurisprudence must be formulated and declared.

It must be clearly evident to the court, as the only reasonable and true construction, that the legislature simply intended to confer upon the municipalities of the state the power to regulate their local police and to pass such necessary police ordinances as were appropriate or adequate to protect the public morals, the public health and the public safety and to promote the good order and peace of the community.[1]

The saying is, indeed, trite that most of the confusion in the law results from the use of inappropriate or indefinite terminology. It would obviously tend to avoid much confusion if the term, 'police power' were confined and limited to those restraints upon private rights and liberties or to those punishments which the morals, health, or peace of the community may require, and if other legislative enactments, such as the regulation of the rates of public carriers, warehousemen and those engaged in more or less public occupations, were embraced within the term 'general governmental or legislative powers.' Rules observed by the courts in construing statutes relating to public health, morals, or peace, have no application whatever to many statutes relating to the use of property, the carrying on of trade or business, etc. For example, it has been repeatedly held that the right to exercise the police power cannot be

[1] 4 Blackstone Com. 162; Bentham's General View of Public Offenses (Edinborough ed. of Works, Part IX, p. 157); *Wilkie* v. *City of Chicago*, 188 Illinois, 444, 450–451; *Wice* v. *C. & N. W. Ry. Co.*, 193 Illinois, 351, 353.

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parted with by the legislature because "no legislature can bargain away the public health or the public morals."[1] Yet, a legislature could clearly grant to a railroad, gas, or water company the right to charge fixed rates, and such a grant, duly accepted and based on consideration, would be held to be a contract protected by the Federal Constitution. Nevertheless, it is suggested, as we have seen above, that such a grant would be a bargaining away of the police power, because the right to regulate charges has been said to be embraced within the police power. Many other examples might be given to illustrate that the loose use of the term 'police power' is misleading, that this term should be confined to statutes or regulations affecting the public health, morals, or safety, and that other subjects of legislation, such as the regulation of rates, should be recognized as coming within the scope of those general governmental powers which are inherent in the legislative branch of our form of republican government. A classification of this kind would simplify the consideration of many cases, and would avoid much apparent conflict. Rules which are wise and necessary in construing police power in the narrower sense indicated, would then be recognized at once to be not at all applicable to the discussion of other governmental powers.

Professor Thayer, in a note to his work "Cases on Constitutional Law," part II, 693, comments on the misuse of the term 'police power,' and, among other things, says:

> "Discussions of what is called the 'police power' are often uninstructive, from a lack of

[1] *Stone* v. *Mississippi*, 101 U. S. 814, 819.

> discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter,—what are the limits of legislative power in general? . . . But often, the discussion turns upon the true limits and scope of legislative power in general,—in whatever way it may seek to promote the general welfare."

So, also, in *Lake Shore & Mich. South. Railway* v. *Ohio*, 173 U. S. 285, 297, Mr. Justice Harlan said:

> "It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

And in the late case of *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, Mr. Justice Holmes, delivering the opinion of the court, said that it was "unnecessary to consider whether the regulation of water rates is properly to be classed as a police power."

The court has not yet been called upon to differentiate 'police powers' from 'general governmental powers,' but it cannot be doubted that when an appropriate case requires it to pass upon the subject, it will make the distinction and point out that the term 'police power' should be confined to the narrower sense which we have indicated.

But the police power of a municipality is clearly something very much more limited than that of a state:

A municipality has no powers inherent in sovereignty. Its police power is just as strictly limited by its charter as is any of its other powers. In fact, the broader the view taken of the inherent police power of a state, the more strikingly it contrasts with the limited and derivative police power of a municipality. No state, it is safe to say, has ever made any general grant to any municipality of such police power as the state itself possesses, to be exercised, within the corporate limits, as fully as the state could exercise it. On the contrary, such police power as is granted is always a restricted power, in some states broader and in others narrower, but always limited to what the legislature may regard as the needs of the municipality and its inhabitants. Hence Judge Dillon, in referring to municipal police power in general, does not treat it as a comprehensive power, granted as such, but merely as the aggregate of such particular powers as the legislature has seen fit to grant in regard to matters of police. He says: "Many of the powers exercised by municipalities fall within what is known as the *police power* of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like." (Dillon's Mun. Corps., sec. 141.)

In *Wilkie* v. *Chicago*, 188 Illinois, 444, 450, the city had passed an ordinance requiring each master plumber to pay a license fee of thirty dollars a year and imposing penalties for performing any plumbing work without taking out such license. The legislature had also pre-

scribed certain conditions upon which plumbers might exercise their calling. A bill was filed to enjoin the enforcement of the ordinance, and the Supreme Court said:

> "A city has no inherent power to license any occupation or to exact a license fee from any person. The power to do so must be found in its charter, and it must be either expressly given or be a necessary incident to the carrying out of a power so granted. The power must be plainly and unmistakably authorized by the legislature. In this case, the power to enact sections 1415 and 1421 is claimed by virtue of clause 66 of section 1 of article 5 of the act for the incorporation of cities and villages, which gives the city council power 'to regulate the police of the city or village, and pass and enforce all necessary police ordinances,' and clause 78 of the same section, which authorizes the council 'to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.' If a city council attempts to exercise the powers so conferred, it is, of course, necessary that there should be some substantial relation between the means employed and the end authorized by the charter. *An ordinance passed in fulfillment of the objects embraced within the provisions in question must have some tendency to promote the public health, morals, security, comfort and welfare or to suppress disease.* So far as this record shows, there was no connection whatever between the ordaining by the city council of sections 1415 and 1421 and the police power or the promotion of health or the suppression of disease. The bill to which the demurrer was interposed sets out the sections already quoted, and they are the only ones before us. The requirement of a license, with the exaction of a license fee, may be a proper and convenient means of regulating the business, but if there was any provision of the ordinance, in con-

nection with the license under section 1415, designed to promote health or suppress disease, or coming within the exercise of the police power, it does not appear. Manifestly, it does not improve the health of the public or suppress disease to collect $30 from a plumber.

There is no more relation between the public health and the collection of $30 from a person engaged in plumbing than there would be from a person engaged in any other business or occupation which in no way affects the public health. So far as the record shows, the city has done nothing except make a demand for $30 per year from each plumber, and there is not a trace of regulation for the public health or comfort or suppression of disease in the provision. As a mere exaction of money could not have the slightest tendency toward the ends contemplated by the clauses of the charter relied upon, the demurrer could not be sustained on the ground that such exaction was an exercise of the powers conferred by such clauses. The city has no power to tax the occupation of plumber, and does not claim to have such power."

This case is particularly instructive, because it demonstrates that the power to pass police ordinances is always confined within narrow limits and does not include the governmental power to regulate rates or license occupations. Otherwise, the court would have held that the power to pass police ordinances, if commensurate with what is usually the 'police power' of the state, would necessarily have included the power to license plumbers or any other occupation.

So, also, the power granted by the City and Village Act to enact and enforce all necessary police ordinances (the very power under which the ordinance now in question was attempted to be passed) was held in the case of *Wice* v. *C. & N. W. Ry. Co.*, 193 Illinois, 351, 353, not

to authorize an ordinance forbidding passengers from getting on or off trains in motion, unless permitted by those in charge, a regulation which no one would doubt was within the police power of the legislature. In that case, the court said:

> "Clause 66 of paragraph 62, article 5, of the act for the incorporation of cities and villages, provides that the city council shall have power 'to regulate the police of the city and pass and enforce all necessary police ordinances.' This is the provision of the statute relied on as conferring power on the city to pass the ordinance, and it can be sustained, if at all, only under the police power conferred on the city by this provision of its charter. In *Culver* v. *City of Streator*, 130 Ill. 238, in defining the police power, we said (p. 243): 'That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public.' This definition is certainly broad enough to cover all the power the city had to pass the ordinance. The provision of the general incorporation act is a delegation by the general assembly to the city of Chicago of police power to pass and enforce all necessary police ordinances—that is ordinances necessary for the comfort, safety, health, convenience, good order and welfare of its inhabitants. . . . It is difficult to conceive of the necessity, as a police regulation, for such an ordinance, and it is only necessary police ordinances that the city is authorized to pass. True, by the word 'necessary,' 'indispensable' was not meant, but only such ordinances as would be conducive to, or beneficial or effective in, the promotion of the comfort, safety, health, convenience, good order, or general welfare of the municipal public."

See also *Kiel* v. *City of Chicago*, 176 Illinois, 137, 141; *Huesing* v. *City of Rock Island*, 128 Illinois, 465, 477.

Illustrations such as the above might be multiplied, but it must be sufficiently clear that the police powers of municipal corporations are not unlimited, and that no attempt to exercise municipal police powers can be upheld by a court unless it be clearly shown to have been authorized by the legislature.

In *State* v. *Sheboygan*, 111 Wisconsin, 23, it was contended that the fixing of maximum charges for the use of telephones in the city was a lawful police regulation to prevent extortion. The court said (p. 38):

> "This [contention] is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. *Such power* is inherent in the state, and is a necessary attribute of sovereignty. It does not pass to the minor divisions of government except by express grant or by necessary implication from other powers granted."

So, in *In re Pryor, Petitioner*, 55 Kansas, 724, 728, it was said:

> "In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is *a sovereign power*, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication."

It may even be questioned whether the words "or by necessary implication" do not go too far. No instance of any grant of such a power by implication was referred to, and none has been found after the most painstaking research.

Upon this branch of the case, it need only be added that if the language of clause 66 above quoted is so comprehensive as to include all the police powers which the legislature itself, as the sovereign legislative

body, could exercise, most of the cases decided in Illinois in limitation of the powers of municipal corporations were entirely erroneous. The cases cited from the courts of Illinois, holding that particular powers did not exist in municipalities, related to matters which were clearly within the general police power of a legislature, if we use that term in its broadest sense. In each case, the power existed, as it exists in almost every municipality in the country, to adopt police ordinances, but until very recently the view has never been seriously advanced that the grant of the power to regulate the police of a city or village and to pass police ordinances was commensurate with the governmental police power of the state itself.

Conclusion.

For the foregoing reasons, it is submitted that the decree of the court below should be reversed.

William D. Guthrie,
James F. Meagher,
William F. Sheehan,
Of counsel for appellant.

Washington, January 8, 1904.

FILE COPY. 11792

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 132.

Office Supreme Court U. S.
FILED
JAN 12 1904
JAMES H. McKENNEY,
Clerk.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATUTES, ORDINANCES, ETC.

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ORIGINAL CHARTER, FEBRUARY 12, 1855.

(Record, p. 26; L. of Ill. 1855, p. 614.)

AN ACT TO INCORPORATE THE PEOPLE'S GAS LIGHT AND COKE COMPANY.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That Matthew Laflin, L. C. Paine Freer, A. G. Throop, D. A. Gage, John S. Wallace, George W. Snow, H. B. Bay and R. H. Foss and their associates be and they are hereby created a body politic and corporate, with perpetual succession, by the name and style of "The People's Gas Light and Coke Company," and by that name they and their successors shall be capable in law of contracting and being contracted with, suing and being sued, defending and being defended in all courts and places and in all matters and places whatsoever, with full powers to acquire, hold, occupy and enjoy all such real and personal estate as may be necessary and proper for the construction, extension and usefulness of the works of said company, and for the management and good government of the same; and they may have a common seal, and the same may alter, break and renew at pleasure.

§ 2. The corporation hereby created shall have full power and authority, forthwith upon their due organization under this act, to proceed to the erection of the necessary works for the manufacture of gas and coke, within said city of Chicago, and on and after the 12th day of February, A. D. 1859, to manufacture and sell gas, to be made from any or all the substances or a combination thereof, from which

inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago or the streets thereof and any buildings, manufactories, public places or houses therein contained, and to erect all necessary works and apparatus as aforesaid; and on and after the said 12th day of February, 1859, or sooner by and with the consent of the Chicago Gas Light and Coke Company, to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the consent of the city council: *Provided*, that no permanent injury or damage shall be done to any street, lane or highway in said city. The real estate which this corporation is entitled to hold shall not exceed in value one hundred thousand dollars.

§ 3. The capital stock of said company shall not exceed five hundred thousand dollars, to be subscribed for and paid in such proportions as shall be prescribed by the by-laws and rules for regulating the concerns of said company as they shall think proper and necessary respecting the management and disposition of the stock, property and estate of said company, the duties of the officers and agents to be employed, the number and election of directors, and all such matters as appertain to the concerns of said company.

§ 4. It is an express provision of the foregoing act of incorporation that the said company shall furnish and supply to the city of Chicago, for all its public uses, at the election of the proper authorities of said city, a sufficient supply of gas, at a rate not exceeding two dollars per thousand feet, and the inhabitants of said city, at a rate not exceeding two dollars and fifty cents per thousand feet.

ORDINANCE GRANTING CONSENT TO LAY PIPES, AUGUST 30, 1858.

(Record, p. 29.)

AN ORDINANCE CONCERNING THE PEOPLE'S GAS LIGHT AND COKE COMPANY.

Be it ordained by the common council of the city of Chicago:

SECTION 1. That permission and authority be, and the same are hereby granted to The People's Gas Light and Coke Company, of the city of Chicago, and State of Illinois, to lay their gas mains, pipes, feeders and service pipes in any of the streets, avenues, highways, public parks or squares throughout said city subject at all times, however, to the resolutions and ordinances of the common council of said city: *Provided*, that said company when they shall open the ground to lay any pipe, or for any other purposes whatever, they shall restore the streets, pavements and sidewalks to a condition satisfactory to the city superintendent, with all convenient dispatch, and no more of any street or alley shall be opened or encumbered at any one time or in any one place, nor shall any street or alley be suffered to remain open or encumbered for a longer period than shall be strictly necessary to enable said company to proceed with their work; and said company shall be liable for all damages which may result from, or by reason of, opening or encumbering any street, alley or sidewalk in said city of Chicago, and *provided further*, that whenever said company shall desire to lay their pipe, or do other work in any of the principal streets of said city, before they commence doing so they shall consult the mayor or city superintendent of public works, and unless the mayor or superintendent consent to such work being done at the particular time, they shall not

proceed with such work on any such principal street, without the express permission of the common council of the said city of Chicago; and *provided, further*, that nothing herein contained shall be construed to conflict with any rights or privileges heretofore given by the common council to the Chicago Gas Light and Coke Company, or in conflict with the provisions contained in the act of incorporation of the People's Gas Light and Coke Company, to first obtain the consent of the Chicago Gas Light and Coke Company, if pipes are laid previous to February 12, A. D. 1859.

AMENDMENT TO CHARTER, FEBRUARY 7, 1865.

(Record, p. 27; 1 Pr. L. of Ill. 1865, p. 589.)

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO INCORPORATE THE PEOPLE'S GAS LIGHT AND COKE COMPANY," APPROVED FEBRUARY 12, 1855.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That the second section of said act be and the same is hereby so amended as to read as follows, viz: The corporation hereby created shall have full power and authority forthwith to proceed to the erection and maintenance of the necessary works for the manufacture of gas and coke within said city of Chicago, and to manufacture, supply and sell gas, to be made from any and all substances or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, any streets, buildings, manufactories, public places or houses therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, and with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues or public squares of said city: *Provided*, that no permanent injury or damage shall be done to any such street, alley, avenue or public square by the laying down of any such pipes.

§ 2. That section three of the said act be and the same is hereby so amended as to read as follows, viz: The capital stock of said company shall be five hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation; it may be divided into such shares, subscribed for, paid and transferred in such proportions and

manner as shall be prescribed by the by-laws and regulations of said company.

§ 3. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint. The board of directors shall consist of not less than three nor more than five stockholders, who shall be chosen by the stockholders at such time and in such manner as the said corporation shall by its by-laws prescribe, and shall hold their office until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors by death, resignation or otherwise; they may adopt such by-laws, rules and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this state, and the fourth section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet.

§ 4. The said corporation is hereby authorized to borrow money and to mortgage or lease any of its property or franchises.

§ 5. This act shall be deemed a public act, and noticed as such by all courts without pleading, and take effect from and after its passage.

POWERS OF CITY COUNCIL, ENUMERATED IN THE CITY AND VILLAGE ACT, APRIL 10, 1872, IN FORCE JULY 1, 1872.

(L. of Ill. 1871–1872, pp. 227–234, 259; amended, L. of Ill. 1887, p. 108[1]; 1 Starr & C. Ann. Stat., 2d ed., p. 689.)

AN ACT TO PROVIDE FOR THE INCORPORATION OF CITIES AND VILLAGES.

ARTICLE V.

OF THE POWERS OF THE CITY COUNCIL.

SECTION 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers:

First—To control the finances and property of the corporation.

Second—To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

Third—To levy and collect taxes for general and special purposes on real and personal property.

Fourth—To fix the amount, terms and manner of issuing and revoking licenses.

Fifth—To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate to exceed five (5) per centum on the value of the taxable property therein, to be ascertained by the last assessment for the State and county taxes previous to the incurring of such indebtedness; and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same.

Sixth—To issue bonds in place of or to supply means to meet maturing bonds, or for the consolidation or funding of the same.

[1] The only amendment of article V, section 1, as originally enacted, consists of additions to subdivision *Ninetieth*, *infra*, p. 16.

Seventh—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Eighth—To plant trees upon the same.

Ninth—To regulate the use of the same.

Tenth—To prevent and remove encroachments or obstructions upon the same.

Eleventh—To provide for the lighting of the same.

Twelfth—To provide for the cleansing of the same.

Thirteenth—To regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *Provided, however*, that any company heretofore organized under the general laws of this State, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this State, subject to such regulations as any such city or village may by ordinance impose.

Fourteenth—To regulate the use of sidewalks and all structures thereunder; and to require the owner or occupant of any premises to keep the sidewalks in front of, or along the same, free from snow and other obstructions.

Fifteenth—To regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage or any offensive matter in, and to prevent injury to any street, avenue, alley or public ground.

Sixteenth—To provide for and regulate crosswalks, curbs and gutters.

Seventeenth—To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign-posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting handbills and advertisements.

Eighteenth—To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds, or upon the sidewalks.

Nineteenth—To regulate and prevent the flying of flags, banners or signs across the streets or from houses.

Twentieth—To regulate traffic and sales upon the streets, sidewalks and public places.

Twenty-first—To regulate the speed of horses and other animals, vehicles, cars and locomotives within the limits of the corporation.

Twenty-second—To regulate the numbering of houses and lots.

Twenty-third—To name and change the name of any street, avenue, alley or other public place.

Twenty-fourth—To permit, regulate or prohibit the locating, constructing or laying a track of any horse railroad in any street, alley or public place; but such permission shall not be for a longer time than twenty years.

Twenty-fifth—To provide for and change the location, grade and crossings of any railroad.

Twenty-sixth—To require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle guards, crossings of streets and public roads, and keep the same in repair, within the limits of the corporation. In case any railroad company shall fail to comply with any such ordinance, it shall be liable for all damages the owner of any cattle or horses or other domestic animal, may sustain by reason of injuries thereto while on the track of such railroad, in like manner and extent as under the general laws of this State, relative to the fencing of railroads; and actions to recover such damages may be instituted before any justice of the peace or other court of competent jurisdiction.

Twenty-seventh—To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and

property in the use of such railroads. To compel such railroads to raise or lower their railroad tracks to conform to any grade which may at any time, be established by such city, and where such tracks run lengthwise of any such street, alley or highway, to keep their railroad tracks on a level with the street surface, and so that such tracks may be crossed at any place on such street, alley or highway. To compel and require railroad companies to make and keep open, and to keep in repair, ditches, drains, sewers and culverts along and under their railroad tracks, so that filthy or stagnant pools of water cannot stand on their grounds or right of way, and so that the natural drainage of adjacent property shall not be impeded.

Twenty-eighth—To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.

Twenty-ninth—To construct and keep in repair culverts, drains, sewers and cesspools, and to regulate the use thereof.

Thirtieth—To deepen, widen, dock, cover, wall, alter or change the channel of water courses.

Thirty-first—To construct and keep in repair canals and slips for the accommodation of commerce.

Thirty-second—To erect and keep in repair public landing places, wharves, docks and levees.

Thirty-third—To regulate and control the use of public and private landing places, wharves, docks and levees.

Thirty-fourth—To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.

Thirty-fifth—To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor, or within such jurisdiction.

Thirty-sixth—To fix the rate of wharfage and dockage.

Thirty-seventh—To collect wharfage and dock-

age from all boats, rafts or other craft landing at or using any public landing place, wharf, dock or levee within the limits of the corporation.

Thirty-eighth—To make regulations in regard to use of harbors, towing of vessels, opening and passing of bridges.

Thirty-ninth—To appoint harbor masters and define their duties.

Fortieth—To provide for the cleansing and purification of waters, water courses and canals, and the draining or filling of ponds on private property, whenever necessary to prevent or abate nuisances.

Forty-first—To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.

Forty-second—To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.

Forty-third—To license, regulate, tax and restrain runners for stages, cars, public houses, or other things or persons.

Forty-fourth—To license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeon hole or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alleys and ball alleys.

Forty-fifth—To suppress bawdy and disorderly houses, houses of ill fame or assignation, within the limits of the city, and within three miles of the outer boundaries of the city; and also to suppress gaming and gambling houses, lotteries, and all fraudulent devices and practices, for the purpose of gaming or obtaining money or property; and to prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations.

Forty-sixth—To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor,

the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: *Provided*, that the city council in cities, or president and board of trustees in villages, may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinance: *Provided, further*, that in granting licenses, such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses.

Forty-seventh—The foregoing shall not be construed to affect the provisions of the charter of any literary institution heretofore granted.

Forty-eighth—And the city council in cities, and president and board of trustees in villages, shall also have the power to forbid and punish the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor to any minor, apprentice or servant, or insane, idiotic or distracted person, habitual drunkard, or person intoxicated.

Forty-ninth—To establish markets and market houses, and provide for the regulation and use thereof.

Fiftieth—To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.

Fifty-first—To prevent and punish forestalling and regrating.

Fifty-second—To regulate the sale of bread in the city or village; prescribe the weight and quality of the bread in the loaf.

Fifty-third—To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.

Fifty-fourth—To regulate the inspection, weighing and measuring of brick, lumber, fire-wood, coal, hay, and any article of merchandise.

Fifty-fifth—To provide for the inspection and sealing of weights and measures.

Fifty-sixth—To enforce the keeping and use of proper weights and measures by vendors.

Fifty-seventh—To regulate the construction, repairs and use of vaults, cisterns, areas, hydrants, pumps, sewers and gutters.

Fifty-eighth—To regulate places of amusement.

Fifty-ninth—To prevent intoxication, fighting, quarreling, dog fights, cock fights, and all disorderly conduct.

Sixtieth—To regulate partition fences and party walls.

Sixty-first—To prescribe the thickness, strength and manner of constructing stone, brick and other buildings, and construction of fire escapes therein.

Sixty-second—The city council, and the president and trustees in villages, for the purposes of guarding against the calamities of fire, shall have power to prescribe the limits within which wooden buildings shall not be erected or placed or repaired, without permission, and to direct that all and any buildings within the fire limits, when the same shall have been damaged by fire, decay or otherwise, to the extent of fifty per cent. of the value, shall be torn down or removed, and to prescribe the manner of ascertaining such damage.

Sixty-third—To prevent the dangerous construction and condition of chimneys, fire-places, hearths, stoves, stove pipes, ovens, boilers and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition, when considered dangerous; to regulate and prevent the carrying on of manufactories, dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition.

Sixty-fourth—To erect engine houses, and provide fire engines, hose carts, hooks and ladders, and other implements for prevention and extinguish-

ment of fires, and provide for the use and management of the same by voluntary fire companies or otherwise.

Sixty-fifth—To regulate and prevent storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitro-glycerine, petroleum, or any of the products thereof, and other combustible or explosive material, and the use of lights in stables, shops and other places, and the building of bonfires; also to regulate and restrain the use of fireworks, firecrackers, torpedoes, Roman candles, sky rockets, and other pyrotechnic displays.

Sixty-sixth—To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

Sixty-seventh—To provide for the inspection of steam boilers.

Sixty-eighth—To prescribe the duties and powers of a superintendent of police, policemen and watchmen.

Sixty-ninth—To establish and erect calabooses, bridewells, houses of correction and workhouses for the reformation and confinement of vagrants, idle and disorderly persons, and persons convicted of violating any city or village ordinance, and make rules and regulations for the government of the same, and appoint necessary keepers and assistants.

Seventieth—To use the county jail for the confinement or punishment of offenders, subject to such conditions as are imposed by law, and with the consent of the county board.

Seventy-first—To provide by ordinance in regard to the relation between all the officers and employees of the corporation in respect to each other, the corporation and the people.

Seventy-second—To prevent and suppress riots, routs, affrays, noises, disturbances, disorderly assemblies in any public or private place.

Seventy-third—To prohibit and punish cruelty to animals.

Seventy-fourth—To restrain and punish vagrants, mendicants and prostitutes.

Seventy-fifth—To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

Seventy-sixth—To appoint a board of health, and prescribe its powers and duties.

Seventy-seventh—To erect and establish hospitals, and medical dispensaries, and control and regulate the same.

Seventy-eighth—To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

Seventy-ninth—To establish and regulate cemeteries, within or without the corporation, and acquire lands therefor, by purchase or otherwise, and cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation.

Eightieth—To regulate, restrain and prohibit the running at large of horses, cattle, swine, sheep, goats, geese and dogs, and to impose a tax on dogs.

Eighty-first—To direct the location and regulate the management and construction of packing houses, renderies, tallow chandleries, bone factories, soap factories and tanneries, within the limits of the city or village, and within the distance of one mile without the city or village limits.

Eighty-second—To direct the location and regulate the use and construction of breweries, distilleries, livery stables, blacksmith shops and foundries within the limits of the city or village.

Eighty-third—To prohibit any offensive or unwholesome business or establishment within, or within one mile of, the limits of the corporation.

Eighty-fourth—To compel the owners of any grocery, cellar, soap or tallow chandlery, tannery, stable, pig-sty, privy, sewer, or other unwholesome or nauseous house or place, to cleanse, abate, or remove the same, and to regulate the location thereof.

Eighty-fifth—The city council, or trustees of a village, shall have power to provide for the taking of the city or village census; but no city or village census shall be taken by authority of the council or trustees oftener than once in three years.

Eighty-sixth—To provide for the erection and care of all public buildings necessary for the use of the city or village.

Eighty-seventh—To establish ferries, toll bridges, and license and regulate the same, and from time to time fix tolls thereon.

Eighty-eighth—To authorize the construction of mills, mill races and feeders on, through or across the streets of the city or village, at such places and under such restrictions as they shall deem proper.

Eighty-ninth—The city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way, or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness.

Ninetieth[1]—The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, *dummy, electric, cable,* horse †or other† railroad company, ‡whether the same shall be incorporated under any general or special law of the State now or hereafter in force,‡ except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes;‖ and when the street or part thereof sought to be used shall be more than one

[1] Amendment of subdivision *Ninetieth* made by L. 1887, p. 114, adds words between asterisks (*....*), between daggers (†... †), between double daggers (‡... ‡), and after parallels (‖). 1 Starr & C. Ann. Stat. 712.

mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile if any in excess of the whole miles measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes.

Ninety-first—To tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers and brokers.

Ninety-second—To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams and horses.

Ninety-third—To regulate and prohibit the keeping of any lumber yard, and the placing or piling or selling any lumber, timber, wood or other combustible materials, within the fire limits of the city.

Ninety-fourth—To provide, by ordinance, that all the paper, printing, stationery, blanks, fuel, and all the supplies needed for the use of the city, shall be furnished by contract, let to the lowest bidder.

Ninety-fifth—To tax, license and regulate second-hand and junk stores, and to forbid their purchasing or receiving from minors, without the written consent of their parents or guardians, any article whatsoever.

Ninety-sixth—To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: *Provided*, no fine or penalty shall exceed $200, and no imprisonment shall exceed six months for one offense.

. . . . . .

ARTICLE X.

(MISCELLANEOUS PROVISIONS.)—WATER.

SECTION 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water-works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance,[1] and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water-works.

[1] The authority to fix water rates is also conferred in more specific terms by the act of June 6, 1891, which follows this section.

STATUTES IN PARI MATERIA.

Water Rates.

(Approved June 2, 1891, in force July 1, 1891; L. of Ill. 1891, p. 85; 1 Starr & C. Ann. Stat., 2d ed., p. 868.)

AN ACT TO ENABLE CITIES, TOWNS AND VILLAGES INCORPORATED UNDER ANY GENERAL OR SPECIAL LAW OF THIS STATE TO FIX THE RATES AND CHARGES FOR THE SUPPLY OF WATER FURNISHED BY ANY INDIVIDUAL, COMPANY OR CORPORATION TO ANY SUCH CITY, TOWN OR VILLAGE AND THE INHABITANTS THEREOF.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the corporate authorities of any city, town or village, now or hereafter incorporated under any general or special law of this State, in which any individual, company or corporation has been, or hereafter may be, authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city, town or village may be.

Rates of charge for various kinds of quasi public service.

In *pari materia* to the provisions expressly conferring power on the city council to fix the rates of charge by individuals or private corporations for certain designated *quasi* public services, are also other statutes: conferring power on any city or village to "fix the rates of toll" on bridges and ferries owned by it (L. of Ill. 1877, p. 61; 1 Starr & C. Ann. Stat., 2d ed., p. 818; L. of Ill. 1881, p. 57; L. of Ill. 1891, p. 72; 1 Starr & C. Ann. Stat., 2d ed., p. 819); authorizing cities, towns and villages owning and operating water-works to "assess and collect" such "rates for the use and benefit of water" supplied by such water works as they "shall deem just and expedient" (L. of Ill. 1873, p. 191; 1 Starr & C. Ann. Stat., 2d ed., p. 864); providing that "the county board shall fix the rate of ferriage at each ferry" (R. S. of Ill. 1845, p. 253; R. S. of Ill. 1874, p. 531; 2 Starr & C. Ann. Stat., 2d ed., p. 1957), and shall also "fix the rates of toll" on toll bridges (R. S. of Ill. 1845, p. 253; R. S. of Ill. 1874, p. 1060; 3 Starr & C. Ann. Stat., 2d ed., p. 3904), and "fix from time to time such rates of toll to be charged" on toll roads "as may be deemed just and proper and for the public good" (L. of Ill. 1877, p. 211; 3 Starr & C. Ann. Stat., 2d ed., p. 3908); directing the board of railroad and warehouse commissioners to make "a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars" on railroads doing business in the state (L. of Ill. 1873, p. 139; L. of Ill. 1873-1874, p. 129; L. of Ill. 1885, p. 232; 3 Starr & C. Ann. Stat., 2d ed., p. 3314); declaring that said board "shall, also, have power to fix the rate of charges for the inspection of grain" (L. of Ill. 1871-1872, p. 768; 3 Starr & C. Ann. Stat., 2d ed., p. 3322; L. of Ill. 1897, p. 301); and prescribing "the maximum charge for storage and handling of grain" (L. of Ill. 1871-1872, p. 769; L. of Ill. 1877, p. 170; 3 Starr & C. Ann. Stat., 2d ed., p. 3323).

CONSOLIDATION OR MERGER ACT, JUNE 5, 1897, IN FORCE JULY 1, 1897.

(L. of Ill. 1897, p. 177.)

AN ACT IN RELATION TO GAS COMPANIES.

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all gas companies now organized, or hereafter to be organized in this State, are hereby authorized and empowered to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease and to hold and enjoy said property.

§ 2. It shall be lawful for any gas companies, now organized or hereafter to be organized in this State, doing business in the same city, town or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, by complying with the provisions of this act, as hereinafter specified.

§ 3. All gas companies which are authorized to manufacture and distribute illuminating gas shall have the power to manufacture and distribute gas for fuel purposes and to distribute natural gas, and all companies authorized to distribute gas in any city, town or village shall have the power to distribute the same in any territory annexed to such city, town or village.

§ 4. The purchase and sale or lease, or the consolidation and merger, hereby authorized, may be made in the manner following: The respective boards of directors or trustees of the company or companies proposing to sell and lease its or their property, and of the company proposing to purchase or lease the same, as under section 1, or of the companies proposing to consolidate and merge into a

single corporation, as under section 2, may enter into and make an agreement, or agreements, under their respective corporate seals, for such sale or purchase or lease, or for such consolidation and merger, describing the terms and conditions thereof and the mode of carrying the same into effect.

§ 5. Before taking effect, the agreement or agreements for sale and purchase or lease, or for such consolidation and merger, authorized by this act, shall be submitted to any annual meeting or to a special meeting of the stockholders of each of the companies. Such special meeting shall be called by delivering personally, or depositing in the post office, at least thirty days before the time fixed for such meetings, a notice addressed to each stockholder of the company whose address is known to the secretary of the company, signed by a majority of the directors or trustees of the company, stating the time, place and object of such meeting. Such stockholders, whose addresses shall be to the secretary unknown, shall be notified by a general notice of the time, place and object of such meeting by publication once a week, for three successive weeks, in some newspaper printed in the county in which the principal business office of such company is located.

§ 6. At any such annual or special meeting, stockholders may vote in person or by proxy, each stockholder being entitled to one vote for each share of stock held by him, and at such meeting there shall be submitted the proposed agreement or agreements. Votes representing two-thirds of all the outstanding capital stock of each company shall be necessary for the ratification of such agreement or agreements, if there be represented and is voted at such meeting, in person, or by proxy, not less than two-thirds of such outstanding capital stock. If less than two-thirds of such capital stock be represented and voted at such meeting, and if there be presented at such meeting the acknowledgments in writing of the receipt of notice of such meeting, from the owners

of stock not represented and voted, to such an amount as would make not less than two-thirds of such outstanding capital stock, when added to the stock represented and voted, then such agreement or agreements may be ratified by the vote of two-thirds of the capital stock represented and voted at such meeting.

§ 7. If any stockholder of any of the companies, parties to the agreement or agreements provided for in section 4, not voting in favor of or not acquiescing in such agreement or agreements, objects to the purchase or lease, or the consolidation and merger, as defined in said agreement or agreements, he shall give notice of his dissent within thirty days of such meeting and may demand payment for his stock, and shall thereupon receive from such corporation in which he shall hold stock, its fair cash value, at the time when the vote for the agreement or agreements was so cast, and such corporation shall cancel the same. But if such dissenting stockholder shall refuse to part with his stock, or if the value of the same cannot be agreed upon, then such corporation shall, within ninety days of the time of said meeting, proceed to take and acquire the same and the interest of said dissenting stockholder therein, by the exercise of the power and right of eminent domain, hereby granted to such corporation for that purpose, and paying to, or tendering to, such dissenting stockholder, or to the county treasurer for his use, the value of the stock by him held, such value to be ascertained as of the time aforesaid and to be found and determined in the manner provided for the condemnation of property for public use in the act entitled "An act to provide for the exercise of the right of eminent domain." Any stock so acquired shall be cancelled by the company acquiring the same. If such stockholder shall not give notice of his dissent within thirty days, as aforesaid, he shall be held to have acquiesced in the agreement aforesaid, and shall be subject thereto.

§ 8. If the agreement or agreements aforesaid shall be approved at each of such meetings of the respective stockholders of each company separately, in the manner herein described, the same shall be the agreement or the agreements of such companies respectively, and a sworn copy of the proceedings of such meetings, made by the secretaries thereof, respectively, shall be presumptive evidence of the holding and actions of such meetings. A certificate of such sale and purchase or lease, or of such consolidation and merger, shall be made by the president of each of the companies, under the seal of the company, and verified by his affidavit, and shall be filed in the office of the Secretary of State, and of the recorder of deeds in the county where such companies carry on their business, whereupon the agreement or agreements aforesaid shall be in full force and effect. The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements. Upon the purchase or lease or consolidation and merger hereby authorized being perfected, a notice thereof shall be published in some newspaper in the county in which the principal office of such corporation is located, for three successive weeks.

§ 9. Any corporation purchasing or leasing the real and personal property of any other company or companies, as provided for in section 1, or any consolidated corporation, as authorized by section 2, shall be subject to and shall perform, for each of the companies so entering into said agreement or agreements, the legal obligations now resting upon each of them, respectively, under their respective charters and ordinances, except where the provisions thereof conflict with the exercise of the powers herein granted, in the same manner and to the same extent as if the companies had remained individual and distinct; and such performance by

said corporation so purchasing or leasing, or by such consolidated corporation, shall be held and considered as the performance by each of the respective companies so selling, leasing or consolidating of the legal obligations theretofore resting upon each of them respectively: *Provided, however*, that nothing in this act shall be construed as extinguishing said companies entering into the agreement or agreements mentioned in this act, or annulling or impairing any of their respective franchises, licenses, or privileges, but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity ever exercised or enjoyed by any of them may be necessary for the protection of their respective creditors or mortgagees, or any of them; the separate exercise of their respective powers, and the separate enjoyment of their separate privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require.

§ 10. The purchase and sale or lease, or the consolidation and merger authorized by this act, shall not be held or construed as a violation of the provisions of any ordinance or bond given thereunder, and shall in no way affect suits pending in which such company or companies shall be parties, and shall not affect causes of action or rights of individuals in any particular. In case the property sold and purchased or leased, or acquired through consolidation and merger, under this act, is subject to mortgage or other lien, such mortgage or other lien shall be and remain a lien upon all properties so sold and purchased or leased, or acquired as aforesaid, so that the same shall be liable for and respond to the payment of such mortgage or other lien existing at the time of such sale or lease, or consolidation and merger, before being

liable for the payment of the debts and liabilities of the company so purchasing or leasing such property, or acquiring the same as aforesaid. Any corporation purchasing or leasing the real and personal property of any other company or companies as provided for in section 1, or any consolidated corporation, as authorized by section 2, shall pay and discharge all debts and liabilities of each of the companies so entering into said agreement or agreements, and actions may be brought and maintained and recovery had therefor against the company so purchasing or leasing, or against such consolidated corporation.

§ 11. Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions:

Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger.

Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger.

§ 12. Any company violating either of the provisions of the preceding section shall be liable in damages therefor to the person aggrieved, and shall, for each offense, forfeit two hundred dollars, to be recovered in an action of debt, in the name of the People of the State of Illinois, or by any person who may sue for the same. Such company shall also be liable to proceedings in *quo warranto*, for violation of either of said provisions, and if adjudged guilty, the court may give judgment of ouster from its franchises, unless the company shall cease and dis-

continue such violation, as and when determined by the court.

And any director or directors, officer or officers, or agent or agents, of such company, who shall willfully and knowingly violate, or be concerned in the willful violation of either of the provisions of the preceding section, shall for each offense, forfeit one thousand dollars, to be recovered in an action of debt, in the name of the People of the State of Illinois.

ORDINANCE FIXING PRICE OF GAS, OCTOBER 15, 1900, IN FORCE JANUARY 2, 1901.

(Record, p. 78.)

Be it ordained by the city council of the city of Chicago:

SEC. 1. That no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used. Said sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas shall be the net price charged, exacted, demanded or collected from each consumer. Manufactured gas so furnished shall afford a light of not less than twenty (20) candle-power, to be measured and ascertained at the place of consumption in said city by the most modern appliances known to science for measuring the candle-power of illuminating gas.

Provided, however, That any corporation, company or companies, firm or person distributing or selling gas for fuel or illuminating purposes in the city of Chicago may, in addition to said seventy-five (75) cents per one thousand cubic feet of gas furnished to such consumer, add a penalty of not exceeding ten (10) cents for each one thousand (1,000) cubic feet of gas so supplied to such consumer for delinquency or non-payment of the bill, statement or charge of said corporation, company or companies, firm or person after ten days from the date at which said bill, statement or charge is made and furnished to such consumer.

SEC. 2. That any company, corporation, person or persons who shall remove any meter or meters

from the house, store, factory or premises of any consumer of gas in the city of Chicago, against the will and consent of any such consumer of gas who is willing to pay for gas furnished him, it or them by any such company, corporation, person or persons, and tenders the amount due at the price established and fixed in section 1 of this ordinance, shall be subject to a penalty of not less than twenty-five ($25) nor more than two hundred ($200) dollars for each and every offense; *Provided, however,* That any company, corporation, person or persons furnishing gas to consumers in the city of Chicago shall have the right to remove any meter or meters for the purpose of repairing the same, on condition that such meter or meters so removed shall be replaced or a new one substituted in its place within twenty-four (24) hours of the time of the removal of any such meter or meters.

SEC. 3. That any company, corporation, person or persons who shall, in violation of the provisions of the preceding sections, charge or require the city of Chicago, or any citizen thereof, or any consumer of gas therein, to pay for gas furnished to it or them, or either of them, a sum in excess of seventy-five (75) cents per thousand cubic feet, or who shall furnish to the said city of Chicago, or any citizen thereof, manufactured gas less than twenty (20) candle-power shall be subject to a penalty of not less than twenty-five dollars ($25), nor more than two hundred dollars ($200) for each and every offense.

SEC. 4. This ordinance shall be in full force and effect from and after the 2d day of January, A. D. 1901; *Provided,* That said ordinance shall not go into effect until it has been duly published, as provided by law.

PROPOSED ACT PREPARED AFTER PASSAGE OF ORDINANCE BY CITY COUNCIL OF CHICAGO FOR SUBMISSION TO ILLINOIS LEGISLATURE.

(Approved by unanimous vote, January 21, 1901.)

AN ACT TO AUTHORIZE CITIES AND VILLAGES WITHIN THE STATE OF ILLINOIS TO REGULATE THE PRICE OF GAS FURNISHED BY PRIVATE CORPORATIONS, COMPANIES AND INDIVIDUALS DOING BUSINESS WITHIN SUCH CITIES AND VILLAGES, AND TO REGULATE THE CONDUCT OF SUCH CORPORATIONS, COMPANIES AND INDIVIDUALS.

SECTION 1. *Be it enacted by the People of the State of Illinois represented in the general assembly:* That full power and authority be and it hereby is conferred upon the city council or board of trustees of any city or village within the state of Illinois to regulate by ordinance the price of gas furnished to the inhabitants in such city or village by any corporation, company or person; provided, that in case any such corporation, company or person shall feel aggrieved at the price fixed by such city council or board of trustees, such corporation, company or person may file a petition in the circuit court of the county in which such city or village may be located, and such city or village may be made a party defendant to said petition, and jurisdiction may be obtained over it by service of summons in the usual manner, and issues shall be formed in said proceeding, and thereupon said circuit court shall hear and determine the issues in said proceeding, and in case said court shall find that the price fixed by said ordinance is unreasonable, the court shall order that said ordinance be annulled; and, provided further, that either party to said proceeding may appeal from the decree of said circuit court to the Appellate Court, and from the Appellate Court to the Supreme Court.

SECTION 2. No person shall, by reason of his being an inhabitant of or freeholder in said city or village, be incompetent to act as a judge or juror in any action or proceeding in which said city or village may be a party in interest.

OPINIONS CHICAGO CORPORATION COUNSEL.

Opinion of Francis Adams on the power to fix gas rates.

(Op. Corp. Counsel and Assts.[1], 1872–1897, p. 41.)

October 18, 1881.

Mr. Patrick Sanders, Chairman, Committee on Gas Lights.

Dear Sir:

Your committee has referred to me a bill for "An ordinance concerning gas companies" for an opinion as to whether the bill if it becomes an ordinance, can be enforced.

The bill is in terms applicable to all persons, firms, and incorporated companies engaged in the manufacture of illuminating gas.

Section 1 requires an annual license to be taken out, and the payment into the city treasury of $50.00 for such license, under a penalty of not less than one hundred nor more than two hundred dollars.

Section 2 prescribes a standard for gas, viz: "Gas which burning at the rate of five cubic feet per hour shall emit a light equal to that produced by eighteen standard sperm candles, each burning at the rate of one hundred and twenty grains per hour."

Section 3 makes it the duty of each person, firm, or corporation engaged in the manufacture of illuminating gas to publish every day in an evening city newspaper the illuminating quality, "by candle power of the gas manufactured that day."

Section 4 provides, substantially, that the charge for gas shall be in proportion to its illuminating power, etc.

Section 5 requires an affidavit to be filed with the city clerk by every manufacturer of illuminating

[1]Published in 1897 "by direction of the city council, under the supervision of the corporation counsel," Mr. William G. Beale.

gas, on the first Monday in October of every year, showing that the provisions of Section 4 have been complied with.

Section 6 imposes a penalty of not less than one hundred nor more than two hundred dollars for each violation of the ordinance.

It is well known that the "Chicago Gas Light & Coke Company" and "The People's Gas Light & Coke Company," which are incorporated companies, supply illuminating gas to the city, and they are the only companies supplying such gas. This being true, the conclusion must be that the ordinance is intended to operate on these companies, as otherwise, it would be without practical effect.

The power to pass the bill in question must be conferred by the charter of the city, or some statute, else it does not exist.

The gas companies cannot be regulated, or compelled to take out a license, unless the power to license, or regulate is expressly conferred. Such power is not conferred by the charter of the gas companies, the charter of the city, or any law of which I have any knowledge.

The only power of regulation conferred upon the city in the premises is to regulate the openings in the streets, alleys, and public grounds, for the laying of gas mains and pipes, and erecting gas lights.

I am, therefore, of opinion that the council is powerless to pass the bill.

The council, however, in consenting by ordinance to the erection of gas factories, and the laying of pipes in the streets by new companies, has power to impose such regulations as it may see fit to impose.

Mun. Code, Art. V, Sec. 1, Sub-sec. 13.

Respectfully,

FRANCIS ADAMS,
Corporation Counsel.

Opinion of C. S. Darrow on the power to fix gas rates.

(Op. Corp. Counsel and Assts., 1872–1897, p. 147.)

March 22, 1890.

To the Committee on Gas, Oil & Electric Lights.

Gentlemen:

The opinion of this department has been asked as to the right of the city to regulate the price to be charged by the various gas companies, doing business in the city of Chicago to the consumers of their product.

It has often been decided that the state legislature has the right to regulate the charges of the companies or corporations engaged in business of a public nature, or whose duty, by reason of the franchises and privileges given it, is to serve the public as well as to promote the interests of their stockholders, unless prevented by an express provision of the charter granted to such company. This has been frequently held of railroad companies, warehouse companies, telephone companies and the like.

In support of this proposition a long line of cases might be cited, among which are:

Dow vs. Beidleman, 125 U. S. 680.

St. Louis vs. Bell Telephone Company, 98 Mo. 623.

Illinois Central Railroad Company vs. People, 108 U. S. 541.

Munn vs. The People, 69 Ill. 80; which case was affirmed in the 94 U. S. 113.

Ruggles vs. People, 91 Ill. 256; affirmed in 108 U. S. 526.

People vs. Budd, decided by the N. Y. Court of Appeals, 22 North-Western Reporter, 670.

Spring Valley Water Works vs. Schottler, *et al*, 110 U. S. 347.

The right of the legislature to control and regulate gas companies has been expressly upheld in:

34 Ohio State, in State vs. Gas Company, 572.

The State vs. Gas Company, 18 Ohio State, 262.

Chicago Gas Light and Coke Company vs. Gas Company, 121 Ill. 530.

The decisions in these cases were rendered upon the theory that such business as the operation of railroads, warehouses, telephone companies, supplying gas, water and the like, were, in their nature public, and should be conducted for the public good, as well as for private gain.

In the case of the Chicago Gas Light and Coke Company vs. People's Gas Light and Coke Company, the Supreme Court, in rendering its decision, used the following language:

"The manufacture and distribution of illuminating gas, by means of pipes or conduits placed under legislative authority in the streets of a town or city, is a business of a public character. It is the exercise of the franchise belonging to the state. The services rendered, and to be rendered, for such grant, are of a public nature. Such right is conferred by legislative grant as well for the benefit of the public as of the corporation taking the same."

The question, then, for determination is, whether the power to regulate and control the price of gas has been delegated to the city council.

It is well settled that the city council has no powers except those which have been delegated to it by the legislature, or which are necessary for the purpose of carrying out the powers granted by the legislature.

This proposition has been repeatedly laid down by our Supreme Court, as well as by the courts of other states. In support of which the following cases may be cited:

Huesing vs. Rock Island, 128 Ill. 465.

Mather vs. Ottawa, 114 Ill. 660.

Chicago vs. Case, 126 Ill. 278.

St. Louis vs. Bell Telephone Company, 96 Mo. 673.

The legislature has nowhere expressly delegated

to the city council the right of regulating the charge of gas companies. If the city council has any power in that question it must be under some general provision of the city charter.

The only general provisions that, in my opinion, could in any way be said to be applicable thereto, are:

First.—Subdivisions 11 and 13 of Section 1, Article V, which provide, in reference to public streets, that the city council shall have power to provide for the lightning of the same, and to regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights; provided, however, that any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council, subject to existing rights, to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose.

The rights herewith granted are meant to be given in relation to the public streets, and while it would doubtless give the city council the power to prescribe by any ordinance giving the right to any gas company to use the public streets, terms and conditions upon which such right should be exercised, it would not, in my opinion, give the city council any power to control the charges of gas companies to private consumers where no conditions were imposed at the time of granting the right to said companies to occupy and lay their mains in streets.

If these charter provisions can be held to allow any regulation by the council after pipes have been laid, and factories built, such regulations must, in

my opinion, have reference to the manner in which the pipes are laid, or the factories constructed.

Second.—Under Subdivision 66, of Section 1, or Article V, which gives power to the city to regulate the police of the city or village, and pass and enforce all necessary police ordinances.

It is doubtless a question just how far a city may go under the exercise of its general police power.

The city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, from cruelty to animals, and regulating many affairs and providing many regulations which conduce to the general welfare, but to say under this provision that the city would have the right to fix the compensation of gas companies, would, in my opinion, be interpreting the police powers to be broader than the courts would sustain. It seems to me clear that the legislature did not intend by the general provision granting police powers to cities to allow municipal corporations to fix the rates of gas companies.

The legislature has expressly given cities the power to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters and expressmen, and other like occupations, and to prescribe their compensation, from which it seems that the legislature did not consider that the general police powers would be sufficiently broad to provide for the regulation of these occupations. Had the legislature intended that gas companies should be regulated as provided in the occupations above enumerated, it seems to me they would have been included with the rest.

In the language of the Missouri court, in the case of St. Louis vs. Shuebrush, 95 Mo. 618, I would say: "With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears that such was not intended to be given in other cases."

The Supreme Court of Illinois has, substantially,

affirmed this doctrine to be the law in the case of City of Cairo vs. Bross, 101 Ill. 495.

It may at least be said that the right of the city council to regulate charges of gas companies is so exceedingly doubtful, and the way to obtain such right by appeal to the legislature is so plain, that it would be ill-advised to attempt the exercise of such powers without the express authority of the legislature.

Respectfully submitted,

C. S. DARROW,
Asst. Corporation Counsel.

Opinion of John W. Green on the power to fix telephone rates.

(Op. Corp. Counsel and Assts., 1872–1897, p. 111.)

September 10, 1888.

To the Financial Committee.

Gentlemen:

In compliance with your request I herewith submit an opinion as to the validity of an ordinance proposing to fix the annual rates to be charged for telephone.

The question involved is whether the city council is vested with power to fix the rates set forth in the ordinance submitted. The power to regulate the rates to be charged for telephones must be derived from General Corporation Act, under which the city is incorporated. Corporate authorities, acting under its provisions, can only exercise such powers and rights as are clearly comprehended within the words of the act or derived therefrom by necessary implication.

McAllister, J., in People vs. Howard, says, "That the following summary of Judge Dillon, Section 89, page 115, is the best summary of all the decisions upon that point to be found in all the books."

"It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following* powers and no others: First, those granted in *express words*. Second, those *necessarily or fairly* implied in or *incident* to the powers expressly granted. Third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable."

The Supreme Court of the State in the case of the City of Cairo vs. Bross, 101 Ill., page 478, says: "When the legislature, by the general incorporation act, declares that the corporate authorities of

cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration must, by a familiar canon of construction, be construed precisely as if the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration."

The Supreme Court of the United States in Thomas vs. West Jersey Railroad Company, 101 U. S. 82, says: "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others."

Mather vs. City of Ottawa, 114 Ill., p. 659.
City of Champaign vs. Harmon, 98 Ill., p. 494.
Gaddes vs. Richland County, 92 Ill., p. 123.
Cook County vs. McCrea, 93 Ill., p. 238.

It cannot be seriously contended that the express power to regulate the rates to be charged for telephones is embraced within the expressed charter powers of the City Council.

My attention has been called to the fact that the city council of the city of Cleveland passed an ordinance regulating the price of gas, but your attention is respectfully called to the fact that the power is expressly delegated by section 2478 of the Ohio statute, to wit:

"The Council of any city or village in which gas companies, or gas light, or coke companies may be established are hereby empowered to regulate from time to time the price which said gas or gas light and coke companies may charge for gas furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places, and such gas light or gas light and coke companies *shall in no event*

charge more for any gas furnished to such corporation or individuals than the price specified by ordinance of such Council."

The validity of the ordinance was tested in the Circuit Court of Cuyahoga County, State of Ohio, in the case of the State of Ohio vs. The Cleveland Gaslight and Coke Company, and Upson, J., says: "It will be seen by an examination of the ordinance that it literally complies with the provisions of the section of the statute. The statute provides that the Council of the city are empowered to regulate the price which said gas or gas light and coke companies may charge for gas. The ordinance is within the strict letter of the provisions of the statute authorizing the City Council to pass such ordinance."

In this case the power was specifically granted by the legislature.

My attention has been called to an ordinance passed by the city council of the city of St. Louis, regulating rates to be charged for telephones. The city charter of the city of St. Louis gives to the city council the power to license, tax and regulate among many other vocations specifically enumerated, bankers, *or other corporations and institutions*, and the general power to *tax, license and regulate all occupations and trades not heretofore enumerated, of whatever name or character.*

In the ordinance giving to telephone companies the right to transact business in the city of St. Louis, it is provided, "That the city of St. Louis *reserves the right to fix the rates* and charges for the use of telephones."

When the question of imposing a license fee on telegraph and telephone companies, the amount of the fee to be determined by the number of poles in use, was submitted to Judge Grinnell, then the city attorney of the city of Chicago, he decided as follows:

"By the general ordinance of the city, no additional wires can be run underground, and no more

poles erected, so, in fact, the enclosed ordinance is to compel the companies to pay a tax or license on existing poles, and unless there is a reservation in the ordinance granting the privileges to erect poles, that the company shall pay a tax or license fee in the manner suggested, the ordinance is of no force or effect, as I understand there is no such reservation."

The power not being specifically enumerated in the charter, if it exists at all, must be found in the general police power of the city, embraced in the powers granted to the City Council by Subdivision 66 of Section 63 of the General Incorporation Law. The power there given is to "regulate the police of the city and enforce all necessary police ordinances."

Justice Lacey, in the case of the Village of Chebanse vs. McPherson, 15 Bradwell, p. 313, says: "The general police power of the *State Legislature* to pass laws for the benefit of the people and society generally is very comprehensive and is used in an enlarged sense, permitting the passage of laws for the protection of life, liberty, and property, or laws for the general welfare, only limited by the provision of the Constitution, *but the word has a more limited and restricted sense as used in paragraph 66, Section 1, Article V, of the General Incorporation Act*, in relation to cities, towns and villages, and may be regarded as restricted to those subjects pertaining to health, morals and good order of the people within the city, town or village."

Hawthorn vs. People, 109 Ill., 302.

As to the construction of the police power of the city, Justice Bailey, in the late case of the City of Chicago vs. Phœnix Insurance Company, says: "It is urged, however, that the power to license, regulate and tax the business of a fire insurance is a police power, that is embraced within the power granted to the City Council by Subdivision 66 of Section 63, of the General Incorporation Law.

The power here given is to 'regulate the police of the city, and pass and enforce all necessary police ordinances.' The statute, while giving such general power, specifically sets forth a great number of subjects of municipal legislation, most of them matters of police regulation, and prescribes the manner and extent of the exercise of the police power over them respectively. Among the subjects thus specifically subjected to police regulation are various avocations and kinds of business, that of fire insurance not being of the number. In another part of the statute, however, the contribution which foreign insurance companies are required to make to the municipal government is especially prescribed, and no provision is there made for any control by the municipal authorities over such companies or their agents beyond that of collecting and receiving the tax thus imposed. Under these circumstances it is manifest that the licensing and taxing of foreign insurance companies, even if held to be proper subjects for police regulation, are not within the grant of power given to the Common Council by the general laws of the statute authorizing it to regulate the police of the city.

"Judge Dillon, in his treatise on Municipal Corporations, says: 'Occasionally the charter or Incorporation Act, without any specific enumeration of the purpose for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well being and good order of the place. More frequently, however, the charter of an incorporating act authorizes the enactment of by-laws in certain specified cases and for certain purposes, and after this specific enumeration a general provision is added that the corporation may make any other by-laws or regulations necessary to its welfare, good order, etc., not inconsistent with the constitution or laws of the state.

"This difference is essential to be observed, for the power which the corporation would possess un-

der what may, from convenience, be termed the general welfare clause, if it stood *alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. 1 Dillon on Municipal Corporations, No. 315. See also State vs. Ferguson, 33 N. H. 424."

This case was appealed to the Supreme Court and they say, that it would be a difficult task to formulate a general rule which would determine definitely the character and scope of every ordinance which a city might pass under this clause of the statute. They dispose of the question that under the police power an ordinance may be passed for the purpose of raising a revenue by licenses, by saying, that it is a subject foreign to the police power conferred on incorporated towns and cities by the statute.

Under the decisions of the case by the Appellate Court of the City of Chicago vs. Phœnix Insurance Company, there would be no question that the right to fix the rates to be charged for the telephones would not come within the police power of the city council.

The Supreme Court refused to pass upon the question when it was directly presented in the argument and until the Supreme Court shall construe this question, the decision of the Appellate Court shall govern the rulings of this department.

JOHN W. GREEN,
Corporation Counsel.

Opinion of William G. Beale on the power to fix telephone rates.

(Op. Corp. Counsel and Assts., 1872–1897, p. 320.)

November 7, 1896.

Noble B. Judah, Esq., Chairman Committee on Judiciary, City Council.

Dear Sir:

There was recently submitted to this office a resolution pending before your committee under reference from the council, as follows:

"Whereas, it is charged that the Chicago Telephone Company is putting in telephones in drug stores, hotels and other places in connection with slot machines, by which the use of said telephone is payable by the public inserting a certain amount in said slot machine contrary to the letter and spirit of the acts and ordinances of the City Council of Chicago granting the right to said Telephone Company to maintain a telephone service in the City of Chicago, therefore, be it

"Resolved by the Common Council of the City of Chicago that for the purpose of investigating the matter of the use of slot machines in connection with the telephone service of this city, and that said committee make proper report thereof to this Council."

In connection with this resolution this office is formally asked "for an opinion (1) as to the rates which the Chicago Telephone Company has the right to charge, and (2) as to its power to place the slot machines in drug stores, hotels, etc., and (3) what power the City of Chicago has to regulate said Company's charges and rates." Informal inquiry is also made (4) as to the power of the city to impose a license in respect to telephones.

I am able to answer these inquiries without much difficulty or hesitation, particularly as the more important of them have heretofore been considered by this department.

(1) The ordinance passed January 4, 1889, under which the Chicago Telephone Company does business, provides in Section six (6) that the company during the life of the ordinance "shall not increase to its present or future subscriber the rates for telephone service now established," and that "there shall be filed by said company a schedule showing the rates charged by said company for telephone service at the date of the passage of this ordinance within the limits of the City of Chicago." This is the only provision of statute or ordinance known to me to be in force in this city bearing upon the subject. There is printed in Myers' Laws and Ordinances of 1890, Sections 4503 to 4515 inclusive, an ordinance passed October 15, 1888, in favor of the telephone company, prescribing different rates, but this ordinance of October 15, 1888, was never accepted by the telephone company, and therefore by its own terms it never went into actual effect.

Pursuant to the ordinance of January 4, 1889, the telephone company filed its schedule of rates for telephone service established (see Council Proceedings of 1888 and 1889, page 846, February 11, 1889) and the rates therein mentioned I regard as its lawful maximum rates to-day to its subscribers for like service. In cases where by special arrangement the company installed the metallic return circuit and long distance instrument instead of the single wire and grounded circuit everywhere in use at the time the ordinance was passed, and still largely used, or installs its so-called "express service," or installs both of these improvements, it charges an extra price therefor, and I do not see why it may not rightfully do so. At least it can refuse to furnish the improved service at the prices for which it must furnish the ordinary service.

I assume that the committee does not desire me to set forth in detail the rates given in the schedules filed, as these schedules are equally accessible to the members of the committee, and that the foregoing general reference will be found sufficient.

(2) The "slot" machines, so-called, are merely telephones fitted with coin receiving and registering devices. The telephone company has the same power to install these combination instruments which it has to install any other form of telephone desired. It cannot force them upon anybody if they are not wanted. But I do not understand that these coin-collecting instruments are in fact furnished for private use at all. They are not rented to subscribers as ordinary telephones are rented, so as to become for the time being the telephones of the subscribers, but on the contrary the telephone company hires the room or the space in which to place them and installs them as its own telephones for public use. A person from whom space is thus rented apparently steps into the relation of agent of the telephone company to care for the instrument instead of having the partially independent control of it as an ordinary subscriber has of his telephone. The relation of the telephone company to these combination instruments so placed, appears to be legally the same as its relation to the instruments which it has in its own public exchanges. In one case it rents a little space in a store or office; in the other, it rents a room or several rooms, or perhaps a building. In both cases the telephone instruments stand on the same legal footing. There are apparently no "subscribers" in relation to them, and they do not appear to be affected by the above quoted ordinance provision.

(3) I think it is clear that the city of Chicago has no power to regulate telephone charges and rates. An extended opinion to this effect was given by Corporation Counsel Green in 1888, and is printed in the Council Proceedings of 1888 and 1889, beginning at page 677, under the date of December 21, 1888. His conclusions seem to be correct. I understand that a similar opinion was given by Corporation Counsel

Winston, but it does not appear to have been printed.

The idea has been expressed that the above quoted language in the telephone ordinance gives the city the right to regulate the rates of the telephone company. This is plainly an erroneous view. In the first place, it is to be noticed that the phraseology of the ordinance provision is altogether insufficient for the purpose. It is a mere prohibition upon an increase of rates, which prohibition is valid only because accepted by the telephone company. Like any ordinary contract, if violated, relief must be had in the courts, for the city has not reserved in the ordinance any right of action in case of such violation. In the second place, I think it may fairly be said that such a right or power as that of prescribing rates of compensation in any business cannot be effectually acquired by a city by virtue of its own ordinances. There must be charter or statutory authority underlying it. The city of St. Louis some years ago passed an ordinance in favor of a telephone company, in which it expressly reserved the right to fix the rates and charges for the use of telephones. Subsequently it passed an ordinance fixing telephone rates, but the Supreme Court of Missouri, in The City of St. Louis vs. Bell Telephone Company, 96 Mo., 623, held this regulating ordinance void on the ground that the city had no charter authority to regulate telephone rates.

The provision of the ordinance of January 4, 1889, prescribing the maximum telephone rates, constitutes a contract between the city and telephone company for the private benefit of telephone subscribers. If the city had power to enter into this contract provision, as I am inclined to think it had, the provision is valid and enforceable; otherwise it is not. Under a well-settled rule of law, any subscriber is entitled to substantially the same rights and remedies under this contract provision as if it had been made directly by such subscriber with the telephone company, unless such rights have been waived.

(4) The city of Chicago does not appear to possess any authority to impose a telephone license. This question also was carefully considered by Corporation Counsel Green on two different occasions, and you will find his opinions in the council proceedings for 1887 and 1888, on pages 151 and 535. I see no reason for changing the previous decision of this department on this question.

Very respectfully yours,

WM. G. BEALE,

Corporation Counsel.

Opinion of Charles M. Walker on the power to fix gas rates.

(Not officially reported.)

May 26, 1899.

To the Honorable, the City Council of the City of Chicago.

Gentlemen:

At your last meeting you adopted a resolution asking for my opinion as to the legal right of your Honorable Body to fix the price of gas used in the city's street lamps, and also as to your right to fix the price of gas to private consumers.

In response to your request you will permit me to say that until quite recently the subject was one regarding which there could be no hesitation in giving an opinion. It is true that the question as to the power of a municipality, acting through its proper channels, to regulate the price of gas or of any other commodity sold or service rendered by any *quasi* public corporation, has not been directly passed on by the Supreme Court of this state in any case where the power was not in express terms conferred. Nevertheless I should have considered the general rule, that a municipal corporation has no power of this kind, except as expressly granted or as necessarily implied from powers granted, to apply. The sole question, then, would have been whether any such power to regulate the price of gas, either as supplied to the city itself or to the public generally, was to be found expressed or implied in the incorporation act (Revised Statutes, Chapter 24). No such expressed power is contained in the act. Numerous decisions of this state tend most strongly against the implication of the power from any grant of authority therein contained.

Until the recent cases of *Rogers Park Water Company* v. *Fergus*, 178 Ill. 571; and *People* v. *Suburban R. R. Co.*, 178 Ill. 594, I should have had, as already indicated, no hesitation in finding that a city council possesses no legal right to regulate the

price of gas, except in those cases where the regulation is inserted in an ordinance as a condition to the grant of a franchise to the gas company. Neither decision just cited covers the point at issue. In the *Fergus* case the power to regulate the water rates was conferred by express grant. In the *Suburban Railroad Company* case the regulation by the Village of River Forest of the rates of fare of the railroad company was adopted as a condition in an ordinance granting the company certain privileges. The language, however, used by the court in both these cases goes much further than was necessary for their mere decision. The general result of that language may be told briefly by the statement that the court seems to indicate that where a *quasi* public corporation has received valuable and important franchises from the public it is bound in a special way to exert its powers for the benefit of the public, and that among other duties, it is bound to serve the public for a return in money that shall not be extortionate in amount. As the court said in the *Suburban Railroad Company* case:

"It is not a private but a *quasi* public corporation, and owes it as a duty to the public to demand reasonable rates only for the transportation of passengers and to serve its patrons without unjust discrimination, and this duty may be enforced by the state, acting directly or through a governmental agency."

By a "governmental agency" the court here is speaking of the municipal body. Had the court meant that this control could be exerted by the municipal body only where there was an express grant of power to that end, the language would have little meaning. It seems to be the intention of the court to declare, although perhaps vaguely, that where a *quasi* public corporation demands rates which are unreasonable or extortionate, the municipal corporation is clothed with the power, either under the general police power or under the

express power regarding streets and alleys, to prevent such extortion and to reduce the rates demanded to a point where they become reasonable.

The most that can be said is that I believe it doubtful that the Supreme Court would go to the extent, in a case directly in point, of holding that this power exists. On the other hand, it cannot be said with certainty that further progress in the line of the two decisions quoted would not advance the court to the position of maintaining the power to the limited extent I have suggested.

I wish to add, however, that there is no question as to the power of the general assembly to regulate the price of gas either directly or by a delegation of the power to the city council.

Respectfully submitted,

CHARLES M. WALKER,
Corporation Counsel.

PEOPLE EX REL. DENEEN

vs.

PEOPLE'S GAS LIGHT AND COKE COMPANY.

(Sup. Ct. of Ill. Oct. 6, 1903; 205 Ill. 482, 486.)

Mr. Justice WILKIN delivered the opinion of the court:

Prior to August 9, 1901, plaintiff in error presented a petition to the circuit court of Cook county for leave to file an information in the nature of *quo warranto* against defendant in error, which was on that day allowed and the information filed, but with the understanding on the part of the court and counsel for the respective parties that the respondent should have the right thereafter to ask that the order be set aside. On the 17th of the same month a motion to that effect was duly made, and after some delay the occasion of which is unimportant, submitted to Judge Haney on the petition and affidavits presented *pro* and *con*. On January 25, 1902, the motion was allowed and the order of August 9 vacated, leave to file the information denied and the petition dismissed. To reverse that ruling this writ of error is prosecuted.

Counsel agreed that leave to file an information in *quo warranto* rests in the sound discretion of the court, and it is admitted by plaintiff in error that this case is to be considered as though the petition had originally been presented to Judge Haney at the time he denied the leave to file the information. It was proper practice, upon the presentation of the petition and the appearance of the respondent, to hear affidavits and counter-affidavits as to the facts relied upon for the leave asked, and unless we can say the court below, upon a consideration of the case so presented, abused its legal discretion, the judgment must be affirmed.

The petition shows that the respondent obtained a franchise from the State of Illinois by an act of the legislature approved February 12, 1855, amended

February 7, 1865, under which, by authority of an ordinance of the city of Chicago, it purchased real estate and erected gas works, etc., for the purpose of supplying gas to the city and its inhabitants, and was engaged in so doing in the month of August, 1897, when, contrary to law, in addition to its own franchise, it began to use and usurp, and continues to use and usurp, without any legal warrant whatsoever, certain franchises and privileges, to the prejudice of the people of the State of Illinois. It then proceeds to aver the consolidation or merger of eight other gas companies furnishing light to the inhabitants of the city of Chicago with the respondent, and concludes with the averment that it "is now using and usurping the several above named franchises and privileges, and has so used the same since and after the third day of August, 1897, in said county of Cook, and still usurps and uses the same, to the great damage and prejudice of the said People of the State of Illinois and against the peace and dignity of the same."

The affidavits filed on behalf of the respondent tended to show that the object of the proceeding was to subserve the purpose of private individuals, and in resisting the leave to file the information it relied upon the well understood rule of law that *quo warranto* will not lie for the enforcement of mere private rights, but can only be resorted to for the vindication of the public interest. The counter-affidavits, though not denying many of the facts set forth in those filed on behalf of the respondent, relied mainly upon the sworn statement of the State's attorney to the effect that after a full and careful consideration of the whole matter he reached the conclusion that the act under which the defendant had consolidated with other gas companies was unconstitutional and void, and that he instituted the proceeding influenced by no other consideration than the protection of what he understood to be the public interest. Comment upon the conduct of parties who seem to have been interested in

bringing about the filing of the petition is, in our view of the case, unnecessary, the affidavit of the public officer satisfactorily showing that he acted from a sense of official duty, uninfluenced by private interests or motives. (*People* v. *North Chicago Railway Co.*, 88 Ill. 537; *McGahan* v. *People*, 191 *id.* 493.) It is not, however, clear from the petition, when considered in the light of the statute authorizing the consolidation and merger of gas companies, that the public would in any way be benefited by the judgment of ouster here sought, and it seems that the order of the court below, denying leave to file the information and dismissing the petition, was largely upon that ground. Inasmuch, however, as the petition is based solely upon the theory that the statute "in relation to gas companies," approved June 5, 1897, is unconstitutional and void, in view of our conclusion upon that subject it will be unnecessary to consider other questions raised in the argument. The position of counsel for defendant in error that *quo warranto* cannot be resorted to for the purpose of determining whether a law is constitutional is not tenable. Section 1 of Chapter 112 of our Statutes (3 Starr & Cur. Stat., p. 3180,) authorizes the bringing of the action in cases of this kind.

The statute is entitled "An act in relation to gas companies" (Hurd's Stat. 1901, p. 495). Section 1 authorizes gas companies organized in this State "to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease and to hold and enjoy said property." The second section (the one under which the respondent is charged with usurping the franchises of other companies) is as follows: "It shall be lawful for any gas companies now organized or hereafter to be organized in this State, doing business in the same city, town or village, to consolidate and merge into

a single corporation, which shall be one of said merging and consolidating corporations, by complying with the provisions of this act, as hereinafter specified." Section 3 authorizes all gas companies "to manufacture and distribute gas for fuel purposes and to distribute natural gas," etc. Sections 4, 5, 6, 7, 8, 9 and 10 pertain to the manner of perfecting the sale or consolidation of companies, and the effect thereof. Section 11 is: "Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions: Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger. Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger." Section 12 provides for the infliction of penalties for the violation of the preceding section, and the recovery of damages by any person injured thereby, etc.

The contention of counsel for plaintiff in error against the validity of the law is, first, it contravenes section 13 of article 4 of the constitution of 1870, and it is said: "The title of this act is 'An act in relation to gas companies.' The whole body of the act relates to the consolidation of gas companies and the sale or lease by one of its property and franchises to another. The subject of 'consolidation,' which freights most of its provisions, is not expressed in the title. The absence of such reference is fatal to the act." If by the expression "which freights most of its provisions," it is meant that the subject of consolidation is the principal object of the statute, the assertion is unwarranted by its language

and provisions. The enactment in the first section, not questioned in the argument, is no less fully provided for in the subsequent provisions of the act than is the "consolidation and merger" authorized by the second. The contention is, that authority for any gas companies now organized or hereafter to be organized in this State, doing business in the same city, town or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, is not consistent with or germane to the general subject "in relation to gas companies."

The validity of statutes under the foregoing section of the present constitution, and a similar one as to special or local statutes in that of 1848, has frequently been before us, and we have uniformly held that "the general purpose of the provision is accomplished when the title is comprehensive enough to reasonably include as falling within that general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect;" (*Potwin* v. *Johnson*, 108 Ill. 70;) that "the fact that many things of a diverse nature are authorized or required to be done is unimportant, provided the doing of them may fairly be regarded as in furtherance of the general subject of the enactment;" (*Blake* v. *People*, 109 Ill. 504;) and that "the generality of the subject embraced in the title is no objection to it, since it is purely a matter of legislative discretion whether the subject expressed shall be general or specific; and it is clear that the broader and more general the subject the greater the number of particular or subordinate subjects which will be embraced within it." (*People* v. *Nelson*, 133 Ill. 565.) "If all the provisions of the act relate to one subject, which is indicated in its title, and the parts of the act are incident to and reasonably connected with the subject indicated and are reasonably auxiliary thereto, then the act may include details of legislation with reference to that subject matter so indicated without the title being a mere

index of everything contained therein. The provision of the constitution cannot be so narrowly construed as to require the title to an act, of itself, to contain the entire act;" (*Park* v. *Modern Woodmen of America*, 181 Ill. 214;) or, stated in other language: "It is not to be expected, neither is it possible, for the title of the act to contain all the various provisions of the act itself. . . . If such was the case, the title to the act would have to be as comprehensive as the act itself. Such was not the object or intent of the constitution." (*Burke* v. *Monroe County*, 77 Ill. 610.) "Judge Cooley, in his work on Constitutional Limitations, (172,) dealing with this subject, says: 'The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible.'" (*Arms* v. *Ayer*, 192 Ill. 601.) We again said in *Allardt* v. *People*, 197 Ill. 501: "The framers of the constitution intended by it to prevent legislation which should not by the title clearly inform the legislature of its purpose and prevent the people from being misled thereby. 'The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection,'" citing Cooley on Const. Lim., sec. 169, *et seq.*, and *People* v. *Institution of Protestant Deaconesses*, 71 Ill. 229.

The many cases referred to as supporting the contention of plaintiff in error, most of which are found in our own Reports, all recognize and enforce the same construction announced in the foregoing decisions. Those of them which hold statutes unconstitutional for a failure to conform to section 13, *supra*, of the constitution, do so because

the enactments were incongruous, not germane to the subject expressed in the title, or that the title furnished no information to the members of the legislature or the public of their purpose. *New York and Staten Island Bridge Co.* v. *Smith*, 148 N. Y. 540, is cited in the brief of counsel for plaintiff in error in support of the foregoing objection, with the comment "squarely in point." This must have been by inadvertence. The case has no bearing whatever upon the question involved. It neither deals with nor discusses it. The only constitutional question there decided was, that parts of a statute conceded to be unconstitutional did not invalidate the whole act.

We have been unable to find any authority for the position that the consolidation and merger of gas companies authorized by section 2 are in any way inconsistent with or foreign to the title of the foregoing statute relating to gas companies, nor are we able to perceive any good reason for such a conclusion. There can be no doubt that in the absence of constitutional limitation the legislature has full power to authorize the consolidation of all private corporations organized under the laws of the State. (1 Beach on Private Corp. sec. 332.) The only restriction in our constitution upon that power is the provision found in section 11 of article 11, which prohibits railroad corporations from consolidating with any other railroad corporation owning a parallel or competing line. Many of the State constitutions contain provisions similar to section 11, *supra*, of our own, and some States have by their constitutions prohibited all combinations of corporations to prevent competition, (6 Am. & Eng. Ency. of Law,—2d ed.—p. 825,) but, as above stated, our constitution contains no such prohibition.

"The legislative power may be exercised by grant in the charters of consolidating companies, or by the provisions of a general or special act of the legislature passed prior to consolidation and after the organization of the original corporations." (1 Beach

on Private Corp. sec. 334.) In section 326 of the same work the following definition of consolidation is given: "The word 'consolidation' is used to denote any conjunction or union of the stock, property or franchises of two or more corporations, whereby the conduct of their affairs is permanently or for a long period of time placed under one management, whether the agreement between them be by lease, sale or other form of contract, and whether its effect be the dissolution of neither of the companies, or whether one of them be dissolved and its existence be merged in the corporate being of the other, or whether it result in the dissolution of both companies and the creation of a new corporation out of such portions of the original companies as enter into the new." Statutes "authorizing the consolidation of 'manufacturing' corporations have been held to include electric light companies, and also, undoubtedly, include gas companies." "Acts of several of the States also authorize the consolidation of corporations of the same nature and covering the same territory. Such an act has been held to include gas companies and water companies, organized to furnish water for the same village." (6 Am. & Eng. Ency. of Law, p. 803, and cases cited.)

The frequency with which corporations are consolidated, by sale, lease or other form of contract, and the fact that many of the States have adopted general statutes authorizing the consolidation and merger of corporations, repel the idea that such consolidation and merger are foreign to the general subject "in relation to corporations" and not reasonably included therein, or, when applied to this act, the subject "consolidation and merger" is not germane to the title "in relation to gas companies." We entertain no doubt that the enactment authorizing the consolidation of gas companies is, under the repeated decisions of this court, embraced in the title of this act, within the meaning of section 13 of article 4 of the constitution of 1870.

The second ground upon which the act is condemned is, that it violates section 22 of article 4, which prohibits the passage by the General Assembly of any local or special laws "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." Soon after the adoption of the present constitution, in passing upon the validity of a provision in the act in force July 1, 1872, known as the "mayors' bill," we said: "The act is neither local nor special. It applies in general terms to all the cities in the State. Whether there may be many or few to whom its provisions will be of any practical force is not the question. As was observed in *McAunich* v. *M. & M. R. R. Co.* 20 Iowa, 338: 'These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation.'" (*People* v. *Wright*, 70 Ill. 388.) To the same effect is *Potwin* v. *Johnson*, *supra*. In *Hawthorn* v. *People*, 109 Ill. 302, the validity of the act of June 18, 1883, in relation to butter and cheese factories, was challenged, for the reason, among others, that it was special or class legislation, but we again said (p. 311): "We fail to perceive that this is not a general law. It embraces all persons in the State similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. . . . A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced." (See, also, *People* v. *Hazelwood*, 116 Ill. 319; *Cummings* v. *City of*

Chicago, 144 *id.* 563; *Park* v. *Modern Woodmen of America, supra.*) The act under consideration applies to all gas companies organized or to be organized in this State, doing business in the same city, etc., and is therefore in no proper sense special or local legislation.

Again, it is said the respondent, "as a result of the act in question, would acquire to itself the franchise of eight other corporations organized under general laws. The company's charter would thus be extended or amended so as to confer upon said company the right to merge with other gas companies or the right of having them merged into itself, and this not by general law relating to all corporations, but by this special law relating only to gas companies. This distinctly contravenes section 1 of article 11, that 'no corporation shall be created by special laws, or its charter extended, changed or amended, . . . but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.'" The entire argument in support of this proposition rests upon the assertion that "as a result of this act the respondent would acquire to itself the franchise of eight other corporations organized under general law." If the proposition was otherwise sound, it cannot be sustained under the facts of this case. The petition fails to show in what way or manner the respondent is exercising any of the rights or privileges, granted to either of the other companies, or that it is using other rights and privileges than those authorized by its own charter. Although the general rule is that the consolidation of several corporations into a new one invests the latter with all the rights and privileges of the several constituent companies, such is not the result of consolidation or merger under this statute. Section 2 expressly provides that the consolidation and merger into a single corporation must be into one of the merging and consolidating corporations, which by section 11, shall be, at the

time of availing itself of or accepting the benefits of the act, in the actual business of furnishing gas to consumers. By the last clause of section 8 it is provided: "The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements." While section 9 makes the consolidated corporation subject to, and requires it to perform for each of the companies so entering into said agreement or agreements, the legal obligations resting upon each of them, respectively, under their respective charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct, it does not confer upon it any enlarged powers or privileges. Moreover, there is nothing whatever in the petition to show that the rights, privileges and franchises of any or either of the consolidated or merged companies are larger or in any way different from those of the respondent.

We are of the opinion that none of the objections urged to the constitutionality of the statute can be sustained. It is scarcely necessary in this case to call attention to or place reliance upon the well understood rule that every presumption must be indulged in favor of the validity of enactments by the legislative branch of the government, and that statutes will only be held unconstitutional and void after resolving every reasonable doubt in favor of their validity. It is said: "If this act is sustained, its necessary and only possible operation will be to promote and create a monopoly. The attempted consolidation under it has resulted in a gas trust." If a monopoly has been created or a gas trust formed by the consolidation of the defendant in error with the other corporations named in the petition, it does not so appear in this proceeding; nor are we able to see how such a result can follow in view of the requirements

of section 11 of the act and the penalties imposed by section 12. Whether the city council of the City of Chicago has power to regulate the price which the respondent company may charge for gas furnished to it and its inhabitants or not, there is nothing in this case to show that extortion is being practiced or a monopoly created by it. It will be time enough to meet those questions when a case is presented involving them.

There was no abuse of legal discretion in denying the leave to file the information and dismissing the petition. The judgment of the circuit court will accordingly be affirmed.

Judgment affirmed.

Mr. Justice Magruder, dissenting.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY, *Appellant.*

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY BRIEF ON BEHALF OF APPELLANT.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
WILLIAM F. SHEEHAN,
Of counsel for appellant.

Washington, January 19, 1904.

[18,672.]

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REPLY BRIEF ON BEHALF OF APPELLANT.

I.

The brief filed on behalf of defendant renews, as was anticipated, the argument based on the supposed prescience of the legislature in 1865, and on the fact that conditions have changed since the passage of the act. A similar contention was discussed by this court in the case of *The Citizens' Bank of Louisiana* v. *Parker*, decided January 4, 1904, and the language of Mr. Justice McKenna, in delivering the opinion of the court, is most apposite to the charter of the People's Company now under discussion, viz.:

> "It [the bank] was created to accomplish purposes in which the state took an interest, and the expectations which were entertained of it may be regarded in the interpretation of its charter. With the wisdom or folly of the charter we have nothing to do. Our sole function is to interpret it. It may seem, in 1903, to have been imprudent legislation. But how did it appear in 1833 and 1836? We must contemplate it as of that time. States act

> through men, and, of course, cannot have a greater appreciation or prophecy of things than men. Events may disappoint or baffle their purposes, but they cannot for that reason be relieved from their obligations. Nor can they necessarily be accused of folly. There are limits to the power of government and the wisest provisions may be frustrated or turned to detriment by causes which no prescience can foresee. It is, therefore, to 1833 and 1836 we must turn, to the conditions and purposes of then. . . . Capital was necessary . . . The scheme was large and hazardous. Private capital had to be tempted to it, and the state, besides contributing its credit, offered the inducement of a relief from burdens."

It is, moreover, now admitted that the rate of three dollars per thousand cubic feet of gas was fair and reasonable in 1865 when the contract was entered into, and that it has become unreasonable only by reason of subsequent events. Upon this point, the following statements are made in appellee's brief (pp. 13, 18, 67):

> "And the court will note the conditions which made the price of three dollars reasonable in February, 1865, when two dollars and two 50/100 dollars was reasonable ten years earlier. It was because of the war of the rebellion still pending—the debased currency of that day—the legal tender dollar being worth forty cents only, and the high war prices" (p. 13).
>
> "The court will not so construe the act that evil intentions can be charged against the legislature of that day.
>
> "It will construe the act as a legislative expression that in 1865 three dollars was a reasonable rate for gas, and that under all due conditions such rate would be reasonable for ten years. No other interpretation, it is submitted, could be put upon the section, without imputing evil motives" (p. 18).
>
> "In the early days, so small was the patronage

> of public service corporations and so costly all methods of manufacture and transportation, that new communities, especially in the west, were willing to make all sorts of concessions to secure the establishment and operation of these public utilities in their midst" (p. 67).

The question, therefore, is whether or not a contract, concededly fair and reasonable when entered into and of which the state and city have had the full benefit, is now to be nullified or disregarded and its legal effect and import subverted simply because of changed conditions.

II.

The appellant's brief heretofore filed fully meets the contention of the appellee in regard to the effect of the merger or consolidation under the act of 1897, and shows that no new corporation resulted or could result therefrom, and that the privileges and immunities which are suspended by section 9 of the act are those of the companies disposing of their property by sale, lease or merger, and not the privileges and immunities of the acquiring or merging corporation. It is clear that the legislature intended to leave untouched the privileges and immunities of the latter.

The evident intent of the act of 1897 was, as the Supreme Court of Illinois has declared, that no new corporation should result from the consolidation or merger. There is nothing in the act transferring to the acquiring or merging company any corporate power, franchise, privilege or immunity whatever of the companies selling, leasing, or disposing of their property. On the contrary, their separate powers, privileges and immuni-

ties are expressly suspended and can never be exercised except "so far as, and for such time as, the protection of such creditors or mortgagees may require" (sec. 9), that is, the existing separate creditors or mortgagees of the transferring or merged corporations. The intention of the legislature clearly was that the property of the transferring or merged corporations should be thereafter held and their business thereafter conducted under the charter rights and powers of the acquiring or merging company, and that the duty of the latter to supply gas should depend upon and be governed and measured by its charter (*People ex rel. Deneen* v. *People's Gas Light & Coke Co.*, pamphlet, pp. 52, 62; *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421). Had the corporate powers, rights and privileges of the merged companies been kept alive to be exercised by the merging company, it might then have been argued that the property of any such merged company "was to be holden in the same manner and subject to the same rights as before." Not having so declared, it cannot be presumed that such was the intent. In *Tomlinson* v. *Branch*, 15 Wall. 460, 465, the direct converse was involved. In that case and in other analogous cases involving the consolidation of railroads, where no *new* corporation was created, the court was governed entirely by the intent of the legislature deduced from the fact that the existing rights, powers and privileges of the *merged* companies should be kept alive and follow the properties transferred, and that such properties should be holden and enjoyed under them and subject to the same liabilities. *Central Railroad, etc., Co.* v.

Georgia, 92 U. S. 665, 675, and cases there discussed. The language used in the act of 1897, however, shows that it was intended that the property acquired by any sale, lease or merger should be thereafter held, enjoyed and operated under the charter of the acquiring or merging company.

Moreover, even when it is clear that the legislature intends to preserve the existing several corporate rights, powers and privileges of the transferring or merged companies, and to continue their several enjoyment "in the portions of the road which had previously belonged to them," the result is not the loss of any existing immunity or exemption, however much any "diversity may sometimes raise questions of some embarrassment." (Mr. Justice Bradley in *Branch* v. *City of Charleston*, 92 U. S. 677, 682.) So, in *Tomlinson* v. *Branch*, *supra*, 15 Wall. at p. 470, partial relief was given, because it appeared that the legislature intended to keep alive the separate rights and privileges of the constituent or merged corporations. Had the legislature, in that and other analogous cases where no new corporation was created, indicated its intention that the corporate rights and powers of the transferring corporations should not pass to the acquiring corporation but should be suspended, it cannot be doubted that the court would have held that the rights, powers, privileges and immunities of the *acquiring* or *merging* corporation should be the measure of its rights, duties, obligations and liabilities in respect of all its property.

The controversy is in fact narrowed to the fundamental inquiry, where does the city council ob-

tain the power to regulate gas rates? It is claimed, on the one hand, that this power is derived from section 3 of the act of 1865, and, on the other hand, that it is to be inferred from a part of subdivision thirteenth of article V of the City and Village Act of 1872. Yet, the two provisions relied on by the city are shown by the appellee's own argument to be doubtful. Thus, we have both claims on behalf of the city based upon statutory provisions which, according to its own contention, are doubtful and ambiguous. In such a case, as has been repeatedly declared, it is the well settled doctrine of this court as well as of the Supreme Court of Illinois and of the courts everywhere, so far as we have been able to ascertain, that doubt and ambiguity are to be resolved against the existence of power in the *municipality* (principal brief, pp. 63, 71).

The cases which hold that a statute or contract in limitation of the right of the *legislature* or of a duly authorized municipality to regulate or tax should be strictly construed in favor of the *public* (*e. g.*, the recent case of *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 371), are not at all in point. No one challenges the doctrine of strict construction in such cases. But this does not in the remotest degree tend to establish the proposition that municipal corporations, mere creatures of the legislature, may exert a particular power without express delegation of it. As Mr. Justice Harlan said at this term in *Atkin* v. *State of Kansas*, 191 U. S. 207, 220, "such municipal corporations exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted." More-

over, the very doctrine of strict construction which the appellee would apply to the charter of the People's Company, obtains equally with regard to any legislative grant of power to the city council, whether under section 3 of the act of 1865 or the provisions of the City and Village Act of 1872.

In view of the contention on behalf of the city of Chicago that the power of its city council to regulate the charges of the People's Company is derived from section 3 of the amendatory act of 1865, and in view of its insistence that the provisions of this section do not extend to the properties of the ten gas companies merged into the People's Company, the inquiry must at once suggest itself to the court, by what right can the city claim that under section 3 of the amendatory act it may in any aspect regulate the price of gas furnished from the plants or through the pipes and mains of such other gas companies? If the charter does not extend to properties which were acquired from other companies, how can it be consistently claimed that the city may regulate the price of gas furnished by means of the properties of those companies? Can it be argued in one breath that the city derives its power from section 3 to regulate all the charges of the People's Company whether in respect of its own original property or in respect of the property of the other companies, and in another breath urge that the limitation contained in the very same section may, nevertheless, be disregarded and nullified as to such other companies? If the city contends that section 3 applies to all gas supplied by the People's Company, it practically admits that the only question before the court is

whether section 3 of the act of 1865 was or was not intended by the legislature to delegate *unlimited* power to the city council of Chicago with respect to the People's Company or properties acquired by it. On that point, it is submitted, the language of section 3 is altogether too plain to admit of reasonable doubt. There is no process of construction by which the proviso or qualifying clause of section 3 can be severed from its collocation and practically nullified.

Of course, the argument that section 3 is now inconvenient or embarrassing because of the provisions of the subsequent constitution of 1870, is entitled to no weight. Contracts cannot be qualified or undermined by subsequent constitutions any more than by subsequent statutes. As Mr. Justice Harlan said in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672:

> "A state can no more impair the obligation of a contract by her organic law than by legislative enactment; for, her constitution is a law within the meaning of the contract clause of the National Constitution. *Railroad Co.* v. *McClure*, 10 Wall. 511; *Ohio Life Ins. & T. Co.* v. *Debolt*, 16 How. 416, 429; Sedgwick's Stat. & Const. Law, 637."

But there is, in truth, no real practical inconvenience or embarrassment in the fact that the legislature instead of a local body must regulate the charges of gas companies. Such was the universal practice in 1865, and such is the practice to-day in a large majority of the states.

III.

In serving appellee with its brief, the People's Company asserted, as it has repeatedly asserted (principal

brief, p. 84), that in every state in which such a question had arisen as that involved in the case at bar, namely, as to the power of a city council to regulate the price to be charged by a private corporation for gas, water, telephones, etc., the decisions had been uniform that such a power could only exist when granted in express language; and appellee has not cited a single authority of a court in any jurisdiction questioning or challenging the soundness of that proposition.

Nor is a single case cited questioning the proposition that where consolidation has been authorized and the statute clearly provides that no new corporation shall be created thereby but that the transferring corporations shall be merged into "one of said merging and consolidating corporations," the rights, privileges, franchises and immunities of the acquiring company are not preserved to the fullest extent. In every case where an acquiring company retained its original charter (*e. g.*, *Central Railroad Co.* v. *Georgia*, 92 U. S. 665, and *Tomlinson* v. *Branch*, 15 Wall. 460), it has been held that the question of the extension of its charter to the acquired property depends upon the intention of the legislature.

In the case at bar, as the Supreme Court of Illinois has declared, no new corporation was intended to be created; it is the People's Company which is furnishing the gas covered by this ordinance; its charter extends throughout the whole city; the ordinance under which it opens the streets and lays its pipes covers the whole city, and it is to its charter and this ordinance that we must refer for the measure of its rights and duties. The legislature contemplated existing conditions; it was

familiar with its own enactments; it knew of this clause in the charter of the People's Company, and, for the purpose of itself regulating the subject, it distinctly provided in section 11 of the act of 1897 that the acquiring company should not increase its rates above those to which competition had reduced them. If the present rate of one dollar per thousand cubic feet is unreasonable, the legislature may reduce it. And, to repeat, there is no practical difficulty in this, for, as is well known, the regulation of rates has until recently always been retained and exercised by the legislature.

IV.

Some of the statements in the brief filed on behalf of the appellee are erroneous, undoubtedly through inadvertence. The contentions of the appellant and its alleged concessions are stated in language quite at variance with the facts and the brief filed on its behalf. The court will, of course, look to the appellant's brief and argument for the contentions and concessions which it makes. But inaccuracy or carelessness in stating an adversary's argument unfortunately tends to increase the labors of the court.

Thus, at page 9, the statement is made that appellant concedes that its "contract is lost when the company takes advantage of the act of 1897, and sets up that a new contract is created by section 11 of that act, which makes a new rate, perpetually, for $1.00." It is only necessary to remark that no such concession is made.

Again, it is stated that the appellant is seeking to "force upon a community a fixed high price, where it

was enjoying a low price by original ordinance, or a regulated price" (p. 78), and that "to hold that under the act of 1897, a high-price corporation could swallow up low-limit corporations and thereby impose its high rates in the low-rate territory would be to encourage fraud and corporate greed throughout the land" (p. 92). Yet, these statements are made in the face of the distinct and indisputable fact that in no single instance was there an ordinance as low in respect of private consumers as the dollar-rate of the People's Company, that there was no lower-rate territory than that in which the dollar-rate was charged by the People's Company, and that there is nothing before the court which in the slightest degree warrants any such statements.

It is further stated on page 42 of appellee's brief that "by the provisions of that act [*i. e.*, the Consolidation Act of 1897], the merging or consolidating companies come under the general law." A perusal of the act of 1897 will show that there is no such provision. This argument is for the obvious purpose of drawing the People's Company under the provision of section 9 of the General Incorporation Act of April 18, 1872, which reserves to the *legislature* power to prescribe regulations (Laws of 1871–1872, pp. 296, 299, 300).[1] Yet, it is the settled law of the Supreme Court of Illinois that the General Incorporation Act does not affect the charters of corporations organized under special acts. *Union Ins. Co.* v. *Frear*

[1] The statement of the appellee as to this General Incorporation Act entirely disregards a similar general act passed February 18, 1857 (Laws of 1857, p. 161).

Stone Mfg. Co., 97 Illinois, 537, 545; *Wincock* v. *Turpin*, 96 Illinois, 135, 144.

By this remarkable process of reasoning, the People's Company, in the face of the indisputable fact that it was organized by special act, is transformed into a "company heretofore [*i. e.*, prior to 1872] organized under the *general laws* of this state," and is thus to be made subject to the regulations provided for in subdivision thirteenth of article V of the City and Village Act of 1872 (Laws of 1871–1872, p. 228). Then, the last clause of subdivision thirteenth is severed from its position and purpose as a proviso and transformed into a distinct and independent clause, so as to relate to a different subject, and the court is told that (appellee's brief, p. 38)—

> "It should have been a separate clause, and we will call it *sub-thirteenth*."

All this shifting of clauses is for the purpose of establishing that, if the People's Company had been organized under the general laws of the state of Illinois, it could have erected gas factories and laid down pipes in the streets or alleys of the city only "subject to such regulations as any such city or village may by ordinance impose." As if this would advance the argument at all or tend to establish that the legislature had delegated to the city council of Chicago the power to regulate the price of gas! See *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471, and cases cited in principal brief, pp. 76 *et seq.*

The argument of the city of Chicago, based on such premises, comes to this, that the provision "subject to such regulations," etc., which obviously qualifies and

relates solely to the city's consent "to erect gas factories and lay down pipes," is to be construed apart from its collocation and is to be given effect as relating to "something different from the power given by clause thirteenth,"[1] in which it is found; or, stated in different language, the words are to be taken out of their place and sentence and separated entirely from the language and matter they qualify in order to make "still another clause," conferring different and broader substantive powers of regulation. Surely, it will require no further comment to refute such an extraordinary proposition, from which the court is solemnly told there is no escape.

V.

The appellee states (brief, p. 40) that the language of section 9 of the General Incorporation Act of 1872[2] (Laws of 1871–1872, p. 299) was construed by this court and the Supreme Court of Illinois in the *Water* cases (180 U. S. 587, 619, 624, affirming 186 Illinois, 179; 186 Illinois, 326; 178 Illinois, 571) to include a reservation of the right to fix water rates. In the *Rogers Park* case, 178 Illinois, 571, 180 U. S. 624, the section cited was not even referred to. While, in the other cases, this section was discussed by the courts, *because the water companies had in fact been organized under the General Incorporation Act of 1872 and not by special*

[1] Appellee's brief, p. 39.

[2] This section 9, however, relates solely to powers reserved to the *legislature* itself, and hence does not bear in any way upon the question whether or not the *legislature* has in fact ever delegated the power to city councils.

charters, nevertheless the decision in those cases, as well as in the *Rogers Park* case, clearly turned upon the construction to be given to section 1 of article X of the City and Village Act (pamphlet, p. 18) in determining whether the municipalities concerned had been empowered to bind themselves by an irrevocable contract not to regulate water rates. That section, which is set out in the *Freeport* case, 180 U. S. 587, at page 593, and the *Rogers Park* case, 180 U. S. 624, at page 628, gave authority to municipalities "to authorize any person or private corporation to construct and maintain the same [waterworks] at such rates as may be fixed by ordinance and for a period not exceeding thirty years." It was held that the decision of the Supreme Court of Illinois in the *Danville* case, 178 Illinois, 299, 309–312, construing this section to mean that the construction and maintenance of waterworks thereunder could only be "at such rates as may be fixed by ordinance" from time to time and not once for all during thirty years, should be followed, because the question was "balanced with doubt." 180 U. S. 596, 623, 628.

The decisions in the *Water* cases in the Supreme Court of Illinois (178 Illinois, 571; 180 Illinois, 235; 186 Illinois, 179; 186 Illinois, 326) are all based on the decisions in the *Rogers Park* case and the *Danville* case, 178 Illinois, 299, and the denial in those cases of municipal authority to make an irrevocable contract to fix water rates was followed by this court in the *Freeport* case, which in turn controlled the decisions in the others.

VI.

The case of *Harrison* v. *The People*, 195 Illinois, 466, 473, is cited by opposing counsel (brief, p. 63) as being contrary to the rule that, in certain cases, great weight is to be accorded to contemporary interpretation by an administrative department. But that case has no such effect. Contemporary interpretation is to be resorted to only in cases of doubt, and, in the case cited, it was simply held that a contemporary interpretation which would result in great inconveniences and absurd consequences would not be allowed to control the court in the construction of the terms of a municipal ordinance not really susceptible of a reasonable doubt. In the appeal at bar, the practical contemporaneous and long continued interpretation of the law department of the city of Chicago is relied on because the interpretation of the City and Village Act of 1872 is said by the city itself to be doubtful. As is well settled, "the rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt." (Mr. Justice Matthews in *Swift Co.* v. *United States*, 105 U. S. 691, 695. See also *Fairbank* v. *United States*, 181 U. S. 283, 310.) In the recent case of *United States* v. *Sweet*, 189 U. S. 471, 473, Mr. Justice Holmes, delivering the opinion of the court, among other things said:

> "The weight of a contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Finnell*, 185 U. S. 236, 244."

VII.

There is no inconsistency between the statement that the legislature by the act of 1897 actually regulated the price to be charged by the purchasing, leasing or consolidating company, and the statement that if the city had contracted for lower rates than those prescribed by section 11 of the act of 1897 in any ordinance granting to a particular gas company the right to lay down pipes, such contract might have to be observed by the purchasing, leasing or consolidating company as an "obligation now resting" upon it. The statement is made *arguendo* by way of anticipation, because in section 23 of article IV of the constitution of Illinois, it is provided that "The General Assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this state, or to any municipal corporation therein." If there had been such an existing contract—and so far as appears no such existing contract has been violated by the People's Company—then in a proper proceeding at the suit of the city to enjoin *pro tanto* the sale, lease or consolidation, its rights would have been adjudicated. No such question is presented in the case at bar, and even if the contract rights of the city had been impaired, the remedy would not be in passing an ordinance regulating the price of gas. It could not take the law into its own hands, and attempt to regulate rates because some contract had been impaired by virtue of an act of the legislature. If any such question could seriously have been urged in 1897 against the consolidation, there can be no doubt that

it would have been held that the right to regulate the price of gas or water, even if reserved in an ordinance granting consent to open the streets, was such a governmental matter as to be always within the power of the legislature to alter or limit as it saw fit, and that consequently section 11 of the act of 1897 securing uniformity and the low price of one dollar per thousand cubic feet throughout the whole city was not in conflict with the provision above quoted from the Illinois constitution. *Atkin* v. *State of Kansas*, 191 U. S. 207, 220; *Covington* v. *Kentucky*, 173 U. S. 231, 240; *New Orleans* v. *N. O. Waterworks Co.*, 142 U. S. 79, 89.

Conclusion.

The brief filed on behalf of the city of Chicago also indulges in a kind of argument which it is difficult to notice with due patience. The court is told that when the act of 1865 was passed undoubtedly "hot" discussions took place (p. 16); that "the gas company's agents evidently prevailed on the legislature" to do this or that thing (p. 16); that "the gas company's people got the best of" a legislator (p. 17); that "appellant must admit that the talented agents of the gas company took the legislature into confidential relations and whispered into their willing ears certain corporate secrets" (pp. 75-~~66~~); that "the legislature could in no other way be aware of the plans and schemes of the gas magnates" (p. 76), etc. This form of dialectics is becoming altogether too frequent, and is, perhaps, the result of irreflection. We shall not venture to criticise or comment upon such statements. In

themselves they sufficiently indicate the full measure of regret which all must feel that any member of this bar should have seen fit to print and file in this court a brief containing them. An argument of this character—

> "Though it make the unskilful laugh, cannot but make the judicious grieve."

Washington, January 19, 1904.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
WILLIAM F. SHEEHAN,
Of counsel for appellant, People's Company.

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CIRCUIT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF ILLINOIS—NORTHERN DIVISION.

IN EQUITY.

DARIUS O. MILLS,

Complainant,

vs.

THE CITY OF CHICAGO AND THE PEOPLE'S GAS LIGHT AND COKE COMPANY,

Defendants.

OPINION OF CIRCUIT JUDGE GROSSCUP OVERRULING DEMURRER OF THE CITY OF CHICAGO AND GRANTING AN INJUNCTION AGAINST THE ENFORCEMENT OF THE ORDINANCE AS PRAYED FOR IN THE BILL.

(Filed January 25, 1904.)

IN THE UNITED STATES CIRCUIT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS.

In Equity.

DARIUS O. MILLS,

Complainant,

vs.

THE CITY OF CHICAGO and THE PEOPLE'S GAS LIGHT AND COKE COMPANY,

Defendants.

OPINION

(Filed January 25, 1904.)

William D. Guthrie, for complainant.

Granville W. Browning and *Edgar Bronson Tolman*, corporation counsel, for the City of Chicago.

GROSSCUP, Circuit Judge:

The bill is by a citizen of California, a stockholder of the People's Gas Light and Coke Company, suing in behalf of himself and all other stockholders of the company similarly situated, against the City of Chicago and the Gas Company, citizens of Illinois. The object of the bill is to restrain the city from enforcing an ordinance passed by the City Council of Chicago, October 15th, 1900, forbidding manufacturers of gas from demanding or collecting from consumers of gas within the city more than seventy-five cents per thousand cubic feet, and attaching a penalty of from twenty-five to two hundred dollars to each violation thereof. The bill charges that the ordinance is invalid, first, because the City Council had no power from the State to regulate gas rates, and, secondly, because the ordinance impairs

the obligation of an alleged contract embodied in the special charter of the People's Company by act of the legislature February 7th, 1865.

Relief in equity is asked on the ground of prevention of multiplicity of suits and because there is no adequate remedy at law to protect the company's rights in the premises.

Prior to the commencement of this suit, another suit had been instituted by the People's Gas Light and Coke Company against the City of Chicago, based upon the ordinance in question, charging, first, that such ordinance was beyond the City Council's delegated powers, and, secondly, if enforced, would impair the company's contract rights under its charter, and asked the same character of relief. That suit went to final hearing on demurrer to the bill, resulting in a decree dismissing the bill upon the merits, as to the alleged contract right, but without prejudice to any other suit in respect to the question of the city's power to regulate rates; and an appeal from this decree by the company is now pending in the Supreme Court of the United States.

In that case, I held that the gas company obtained no immunity in its charter from the right of the State, in the exercise of its general powers, to reasonably regulate the rates at which gas should be manufactured and sold. Thus holding, the jurisdiction of the court failed, for the case no longer could be said to arise under the Constitution and laws of the United States. On that account, I expressly declined to pass on the question whether the City Council had power delegated to it from the State to regulate rates; holding that such

question was not before the court. But in the suit now under consideration, that question is brought directly in point.

The right of Mills, a stockholder, to maintain this bill on the state of facts here existing, is challenged. Though it lies at the threshold of the case, I will pass that question until the main question, the power of the City of Chicago to regulate rates of gas, is disposed of.

Has the city the power by ordinance to regulate the rates of gas supply? A municipal corporation possesses only such power as is granted by the legislature in express words, or such as is fairly implied from power expressly granted, or is essential to the specific object and purposes of municipal existence. No one has pretended that the regulation of the price of gas is essential to the specific object for which the City of Chicago was created; hence that source of possible power may be dismissed without further discussion.

The chief argument of counsel for the city is, that the power is to be found in the statute of Illinois, known as the City and Village Act, and their finger is laid on the eleventh, thirteenth and sixty-sixth sections as the clauses containing the grant. These sections are as follows:

> "The City Council in cities and president and board of trustees in villages shall have the following powers: . . .
>
> "*Eleventh.*—To provide for the lighting of the same [streets]."
>
> "*Thirteenth*—To regulate the openings therein [in streets] for the laying of gas or water mains and pipes and the building and repairing of sewers, tunnels and drains and erecting gas lights: *provided, however*, that any company heretofore

organized under the general laws of this state or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages or the inhabitants thereof, with the same, shall have the right, by consent of the Common Council (subject to existing rights), to erect gas factories and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

"*Sixty-sixth.*—To regulate the police of the city or village and pass and enforce all necessary police ordinances."

It is plain to me that the sixty-sixth section, while granting power to regulate the police of the city or village, cannot be enlarged to include power to regulate the prices of gas. The power delegated by the state to the city is not the police power of the state. To so construe it would be to invest the city with nearly all the powers of the state—make the city practically a state by itself. Such manifestly was not the purpose of the section. The section looked, not to the police power of the state in its wide constitutional sense, but to a police in the sense of a local constabulary.

The eleventh section contains no such grant as is claimed. Its purpose is to provide merely for the lighting of streets. Power to light streets and power to regulate the prices at which a manufacturer shall furnish his commodity to the city and the people living within the city, are generally so distinct that no discussion need ensue.

The chief claim of the city is based on the thirteenth section. The section reads as follows:

"*Thirteenth.*—To regulate the openings therein [in streets] for the laying of gas or water mains and

pipes, and the building and repairing of sewers, tunnels and drains and erecting gas lights: *provided, however*, that any company heretofore organized under the general laws of this state or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right by consent of the Common Council (subject to existing rights) to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

Read as an entirety, the section clearly grants no general power to regulate rates. Thus treated, the last clause, "subject to such regulations as any such city or village may by ordinance impose," relates back to, and is limited by, the opening clause, which is taken up solely in the regulation of openings in streets for the laying of gas and water pipes. But the court is asked, first to divorce the proviso from the balance of the section so that the proviso may stand as a section apart, and then to interpret the concluding clause as if the word "regulations" was meant to include the rates at which gas should be manufactured and sold, as well as the manner in which the gas factories should be erected and the pipes laid.

I do not feel myself at liberty to close my eyes on the proviso. Presumably it was meant to be read in connection with the whole section, but if I did, it would be unavailing. The context shows that the last clause was not intended to confer upon the City Council plenary power to regulate rates, as well as the manner in which gas factories should be erected and pipes laid down. The mere laying of gas pipes and the installa-

tion of gas plants, together with their repair, are the subject matter of a power widely separable in circumstance and in substance from the power to deal with the rates at which gas shall be manufactured and sold. The first belongs naturally to the city whose streets are to be occupied, for it is related intimately with the supervision of streets; the latter with equal reason, is foreign naturally to the city, for the city is one of the parties in interest; and power to regulate prices ought not in the usual course of affairs to go to a party interested. Until there is legislation more unmistakable than the language used in this section, to indicate a purpose to grant the city power to fix rates, I shall not hold that such was the legislative intent. Unquestionably, the power resides somewhere in the state, but until consciously delegated to some other body, it remains in the state's general repository of power, the general assembly of the state. I may add that in this interpretation I am but following the opinions of Mr. Francis Adams, Mr. Wm. G. Beale, Mr. C. S. Darrow, and Mr. John W. Green, rendered by them severally as corporation counsel, as also what I take to be the opinion of Mr. Walker during his incumbency of that office.

This brings me, then, to the question of jurisdiction. The first point urged is that a court of equity is without jurisdiction to restrain the enforcement of the invalid ordinance. To this I cannot consent. The Gas Company has more than three hundred thousand consumers. An attempted enforcement of its rates by suits at law in the face of this invalid ordinance might lead to three hundred thousand such suits. An attempted enforcement of its rights by cutting off the gas might

lead to three hundred thousand prosecutions. Under what circumstances, it might be asked, would equity take jurisdiction to avoid a multiplicity of suits if the present were not such a case.

The second point urged is that the jurisdiction of the court as a federal court fails, because, in a proper alignment of parties according to their interest, the Gas Company should be grouped with the complainant, and on such grouping, diversity of citizenship between both complainants and the defendant would disappear. It is sufficient to say that in the recent case of *New Albany Waterworks* v. *Louisville Banking Co.*, 122 Fed. Rep. 776, the Circuit Court of Appeals for this circuit sustained federal jurisdiction in a case analogous in all material respects to the one under consideration.

The third point is that the suit is collusive in this, that it is apparent that the Gas Company has refused to bring a suit in its own name in the state courts to which it was relegated, solely that this complainant might obtain a footing in the federal court. This may or may not be the true explanation of the company's inaction. In the present state of the record, it cannot be treated as the explanation. The bill avers that Mills demanded of the company that it bring such suit, and that such demand was refused; and this, on the face of the record, is admitted by the demurrer. When the city raises the question by proper pleading or points to some fact in the record that would authorize the court to act *sua sponte*, it will be time to inquire whether collusion in fact exists.

The fourth point against jurisdiction is the one on which greatest stress is laid. In the suit previously

heard here, pending now on appeal by the Gas Company in the Supreme Court, the Gas Company challenged the validity of the ordinance both because it was said to impair the company's contract right under its charter and because the City Council was without power delegated to it by the State to regulate the prices of gas. The Court held in that case that no charter contract as claimed existed, and so holding declined to hear or pass upon the question of delegated authority, for the reason that the cause came into the federal court solely as one arising under the Constitution and laws of the United States. Wherefore, the ground of federal jurisdiction failing, the other question involved—solely one of state law—must go out of court also, though without prejudice to a new suit in the proper forum.

I think under such circumstances it to be unquestioned that had there been no appeal, and had the company refused to bring a new suit in the appropriate tribunal, a suit such as this would lie at the instance of a stockholder. But the insistence of counsel is that the appeal by the Gas Company to the Supreme Court on both grounds shows that the company is still seeking, in the Supreme Court of the United States, to invalidate the ordinance as one not delegated under the laws of Illinois to the City Council, and in so doing meets fully its duty in the premises to its stockholders. The trouble is that such appeal does not fully meet the measure of the company's duty. The suit pending on appeal will not bring a judgment touching the power of the City Council, if the impairment of contract question be determined against the company. This court has so

held, and there is no reason to believe that the Supreme Court will hold otherwise. At any rate, until it is held otherwise, the former holding remains the law of the case.

But if the company has taken no measure conformable to law to prevent the wrong threatened, the right of the stockholder to take such measures cannot be disputed, and a measure conformable to law is to be tested, not by the company's opinion of the law, but by the law itself. The stockholder is entitled to the law, not to a mistaken view of the law; to an action that will lie, not to an action that must be dismissed for want of jurisdiction in the court resorted to.

The demurrer will be overruled and an injunction entered as prayed for in the bill.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1903.

No. 132.

THE PEOPLE'S GAS LIGHT and COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF APPELLEE.

MAY IT PLEASE THE COURT:

Appellant filed a bill and amended bill, in the United States Circuit Court, attacking an ordinance of the City of Chicago, which provides that the price of gas furnished to consumers throughout the city shall not exceed the sum of seventy-five cents per thousand feet.

Appellant sets out in its amended bill that under its special amended charter, passed by the Illinois legislature in 1865, it had a contract whereby the city could not reduce the price below the sum of three dollars per thousand feet, and that by virtue of its having taken advantage of the Gas Consolidation Act of 1897, by merging with many other companies set out, it had still a contract whereby the city was prohibited from reducing the price

of gas below the sum of one dollar per thousand feet and that it was charging one dollar.

That the passage of the ordinance complained of constituted an impairment of that contract.

Furthermore, the amended bill set out that the city council had no power from the state whereby it could pass an ordinance fixing the rates to be charged by the appellant company for gas.

The demurrer to the original bill was sustained and the court's opinion is published in 114 Federal Reporter, page 383.

The demurrer to the amended bill was also sustained, but for some reason the opinion was not published.

We append the second opinion, as it now stands after an amendment suggested by the court, as Appendix A.

By the decree entered sustaining the demurrer to the amended bill the court ordered that the amended bill be dismissed upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois.

From that decree this appeal is prosecuted.

The appellee, the City of Chicago, respectfully urges that the decree dismissing the amended bill should be affirmed upon the express grounds:

I.

THAT APPELLANT HAS NO CONTRACT, EITHER BY VIRTUE OF ITS CHARTER ACT OF 1865 OR OF ANY PROVISION OF THE GAS CONSOLIDATION ACT OF 1897, WHEREBY THE CITY COUNCIL IS PROHIBITED FROM REDUCING THE PRICE OF GAS TO A REASONABLE SUM.

II.

THAT THE CITY OF CHICAGO IS EMPOWERED BY THE LEGISLATURE TO REGULATE THE PRICE OF GAS FURNISHED AS WELL BY THE OLD PEOPLES' COMPANY AS BY THE CONSOLIDATED PEOPLES' COMPANY, BOTH BY THE CHARTER ACT OF 1865, AND BY THE CITIES, VILLAGES AND TOWNS ACT OF 1872.

For convenience we will discuss the points involved under the following heads:

I.

THE CHARTER ACT OF 1865 GRANTS NO CONTRACT OF IMMUNITY TO THE ORIGINAL PEOPLES' GAS, LIGHT AND COKE COMPANY.

II.

THE ACT OF 1897 CONTAINS NO LANGUAGE WHICH VESTS IN CORPORATIONS ACCEPTING ITS PROVISIONS ANY CONTRACT OF IMMUNITY, AS CLAIMED.

III.

THE CITY IS GIVEN THE RIGHT TO REGULATE THE PRICE OF GAS FURNISHED BY THE ORIGINAL PEOPLES' COMPANY, AFTER THE YEAR 1875, BY THE CHARTER ACT OF 1865.

IV.

THE CITY ALSO DERIVES THE POWER TO REGULATE THE PRICE OF GAS FROM THE CITIES, VILLAGES AND TOWNS ACT OF 1872.

V.

EVEN IF THE ORIGINAL PEOPLE'S COMPANY ENJOYED THE IMMUNITY CLAIMED, BY VIRTUE OF THE CHARTER ACT OF 1865, IT LOST THE SAME UNDER THE TERMS OF THE ACT OF 1897, BY GOING INTO THE CONSOLIDATED COMPANY.

I.

Appellant claims that under the terms of its charter act of 1865, the original People's Gas, Light and Coke Company enjoyed a contract by the terms whereof the legislature agreed that it would never empower the city to lower the price of gas below the sum of Three Dollars. There has been some little uncertainty in the position of different counsel as to just what the terms of their alleged contract are, but in appellant's brief in this court counsel states that the contract claimed is one made by the legislature to the effect that the City Council would never be authorized to compel the original People's Company to furnish gas at a less rate than three dollars.

This court, in construing grants from the legislature to public-service corporations such as this, invariably takes that meaning of the grant which is most favorable to the public and take all intendments against the corporation.

Where any ambiguity arises it is resolved in favor of the public.

So necessary has the court found it to be to guard the public against the greed and aggressions of this class of corporations that in almost every case where ambiguity arises, the decision has been against the grant claimed by the corporation.

This is particularly true in all cases where governmental control of the rates to be charged by these corporations is involved. Wherever a corporation claims immunity from this branch of the police power, for such this control of rates is, the legislative act claimed to grant the immunity is scrutinized by the court with an eye jealous for the public right and invariably where an ambiguity appears in the act, the doubt is resolved against the corporation. The case at bar particularly appeals to this rule of conduct followed by the court, because it is claimed that on the face of the original act the legislature contracted that the city would never under any circumstances be authorized by the legislature to regulate the price of gas below the sum of three dollars.

Recognizing the enormity of the position taken, appellant seeks to escape some of the odium attached thereto by arguing that it voluntarily reduced the price from three dollars to one dollar and that by the terms of the Consolidation Act of 1897, they now have a contract by which the legislature will never authorize the city to lower the price below one dollar. But the confession and avoidance will not help them. In interpretating the Act of 1865, it must stand by itself, unaided by any subsequent voluntary surrender.

If it was at all such a contract as appellant claims, it was a contract that the company should be enabled to maintain the unconscionable rate of $3 forever, undisturbed by the city. The validity of the claim of a contract must rest on the act as it was passed, without any helping out by subsequent surrenders or by the provisions of subsequent legislation.

The original act either vested a contract in appellant in strict terms or it did not.

It is submitted that under the decisions of this court, the reading of the act makes appellant's position absolutely untenable.

The original People's Company got its first franchise by the Act of 1855.

By Section 4 of that act it was provided that the company might charge a maximum rate of two dollars to the city and two dollars and fifty cents to all other consumers. The act is silent as to any power of the city, except to provide that the operation of the company in Chicago was subject to the consent of the city. By the Act of 1865, its operation in the city, is still to be only "with the consent of the Common Council of said city," but the company was empowered to increase its capital stock, etc., and by Section 3, it was provided that Section 4 in the old act, fixing rates, should be repealed and the section then reads:

"But ten years after the passage of this act the Common Council of the City of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said Common Council of the City of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

It is from this language that appellant claims it derives its contract.

If, in this language, however, there be any ambiguity, then the court will construe the same most favorably to the public.

The claim by such a company that it has a contract granting it immunity from regulation as to rates will not be allowed unless the surrender by the public is made by explicit and unmistakable language. The surrender

will never be sustained, by implication and will never be established by ambiguous terms. An ambiguous phrase must always be interpreted in favor of the public. To this effect are the following cases:

Georgia Banking Co. v. *Smith*, 128 U. S., 174.
Freeport Water Co. v. *Freeport City*, 180 U. S. 587.

And following cases.

Covington & Lexington Turnpike Co. v. *Sandford*, 164 U. S., 578.
Charles River Bridge case, 11 Peters, 547.
Delaware R. R. Tax case, 18 Wallace, 225.
Stone v. *Farmers' L. & T. Co.*, 116 U. S., 307,

and accompanying cases.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 362.

And following cases.

City of Covington v. *Kentucky*, 173 U. S., 231.
Chi., Mil. & St. Paul Ry. v. *Minnesota*, 134 U. S., 418.

In the Freeport case, 180 U. S., 587, the water company's ordinance provided that the rates set out therein should *not in any way be changed except by mutual consent*, and the company contended that that language constituted a contract in them. Yet this court held that the language was not sufficiently explicit to surrender the city's power to regulate. On p. 599 the court says that the power of regulation, if any doubt exists, must be resolved in favor of the municipality; that if the power can be bargained away at all, it can only be by *positive words and intention*. On p. 600, the court says:

"Of the two constructions that must be adopted

> which is *most favorable to the public,* not that one which would so tie the bands of the council that the *rates could not be adjusted* as justice to both parties might require at a particular time."

No limitation on the power of the city to regulate rates can be upheld by implication; it must be established by language in the contract clear and explicit.

In the Danville case, 180 U. S., 619, the charter to the water company provided that rates detailed therein should be paid *during the life of the franchise,* yet the court held that the City Council could thereafter regulate rates.

In the Stone case, 116 U. S., 325, the language of the company's charter was that the *company should fix its own charges from time to time.* The Supreme Court held that the power to fix charges granted was limited by the *rule* of the *common law, which required all charges to be reasonable,* and that the state's power to make them reasonable had not been surrendered.

In the Railroad Commission case, 116 U. S., 307, the charter gave the company the right to "fix, regulate, and maintain tolls and charges." The court held that the state could regulate charges, that if the state's power could be bargained away at all it could only be done by *"words of positive grant";* that any reasonable doubt of the meaning of the charter must be resolved in favor of the public.

In the Railroad Commission case, 116 U. S., p. 347, the charter gave the company the right to "adopt and establish such a tariff of charges * * * as they may think proper," and the same to "alter and change at pleasure."

In the case on p. 352, the language was "to receive * * * such tolls and charges as shall be from

time to time established, fixed, and regulated by the directors."

In Covington Turnpike case, 164 U. S., 578, the charter provided that "the legislature reserves the right to reduce rates * * *," so that the company should make fourteen (14) per cent. dividend, "and no more." By a subsequent act in 1851 the corporation was divided into two, "each company possessing and retaining all the *powers, rights and capacities*" of the old company. The court held that the rates of the new company were subject to regulation by the legislature. On p. 588, the court says that the Act of 1851 (dividing the company) is *susceptible of the interpretation* that the state intended to extend to the new companies the right to maintain the original limit of income, but that the *other interpretation* reserving to the state the right to regulation must be adopted. This case is particularly instructive, because there was an apparent right to a certain rate inviolable, with a reserved right of regulation above that rate. The same claim is made here, that the right reserved to the city is only active above the limit of three dollars.

In all the cases the claim was vigorously urged that the charter constituted a contract, giving the company in each case immunity from regulation.

In all these cases and many others of similar nature before this court, the claim was rejected because the interpretation in each case must be against the corporation.

So, in the case of *Georgia Banking Co.* v. *Smith,* 128 U. S., 174.

The company's charter contained the following language:

"Provided, that the charge of transportation or conveyance shall not exceed 50 cents per hundred pounds on heavy articles, and 10 cents per cubic foot on articles of measurement, for every one hundred miles, and 5 cents per mile for every passenger."

The Constitution of Georgia (1877) authorized the legislature to "regulate freight and passenger tariffs." The Act of 1879 created a Board of Railroad Commissioners who were to fix rates.

The railroad company contends this impairs the obligation of its contract. The court says:

"It has been adjudged by this court in numerous instances that the legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce.

Stone v. *Farmer's Loan & Trust Co.*, 116 U. S., 307.

Dow v. *Beidelman*, 125 U. S., 680.

"The incorporation of the company, the grant to it of special privileges—particularly right of eminent domain, and obligation to transport all persons and property upon like conditions and reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control.

"So long as use continues, the *power of regulation* remains, not merely as to provisions for security and convenience, but also *to prevent extortion by unreasonable charges* and favoritism by unjust discriminations.

"This is not a new doctrine, but old doctrine, always asserted whenever property or business is by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use.

"Differences of opinion have existed among judges of this court as to conditions under which some kinds of property or business may be properly held to be thus affected as in *Munn* v. *Ill.*, 94 U. S., 113, but none as to the doctrine that when such use exists the business becomes *subject to legislative control* in all respects necessary to protect the public against danger, injustice and oppression.

"The question arises whether the 12th section of charter (containing above clause) is a contract that it may make any charges within limits there designated. It contains no stipulation, nor is any implied, as to any future action of the legislature. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, *the legislature*, had in 1833, *contracted* that the company *might, for all time, charge rates for transportation of persons and property* over its line *up to the limits* there designated.

"It is conceded that a railroad corporation is a private corporation, though its uses are public, and *that a contract embodied in terms in its provisions*, or *necessarily implied* by them, is within the constitutional clause prohibiting legislation *impairing the obligation of contracts.*

"*If the charter* in this way provides that the charges of the company shall *be subject only to its own control* up to the limit designated, *exemption from legislative interference within* that limit *will be maintained.*

"But to effect this result, *the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state.*

"There is no such language in the present case."

In the case of *City of Covington* v. *Kentucky*, 173 U. S., the power was granted to erect and carry on water works and the statute provided that:

> "Said reservoirs, machinery, etc., with the land upon which they are situated, shall be and remain forever exempt from state, county and city tax."

The court holds that this act was subject to repeal because a contrary interest was not plainly expressed—there being room for doubt.

In *Rogers Park Water Co.* v. *Fergus*, 180 U. S., 624, the ordinance to the water company provides:

> "The said grantee or assigns shall charge following annual water rates during existence of this franchise. * * *"

This ordinance fixed rates for private as well as public water supply.

The court says, reading on page 630:

> "This, it will be observed, is the language of command, not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away, and that the conditions which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding."
>
> "There is no complaint in this case that the rates fixed by City of Chicago were unreasonable. Plaintiff in error relies strictly on contractual right. We think it has no such right."

In the light of these decisions it is respectfully submitted that there is no such unmistakeable language here as gives appellant the contract claimed.

The three dollars named in Section 3 is but the legislative opinion that at that time the sum of three dollars is a reasonable charge, but the act does not provide that the same shall forever remain the minimum rate.

As the court says in the Georgia Banking and R. R. Co. cases, it will require much clearer language than that used in Section 3 to persuade the court that the legislature had in 1865 contracted that notwithstanding the probable altered conditions, the Gas Company might for all time charge this sum of three dollars free from municipal interference.

And, as in the Rogers Park case, there is no stipulation that the conditions warranting the fixing of the price at $3 in 1865 would continue forever.

And the court will note the conditions which made the price of three dollars reasonable in February, 1865, when two dollars and two 50/100 dollars was reasonable ten years earlier. It was because of the war of the rebellion still pending—the debased currency of that day—the legal tender dollar being worth forty cents only, and the high war prices.

The language of this act requires the same reasoning followed by the court in the Freeport Water Company case.

One interpretation is in favor of the public and one in favor of the corporation.

By this Section 3 the legislature reserves to the city council its own confessed right of regulation.

The Act reads:

> "But ten years after the passage of this act the Common Council of the City of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas. * * *"

The intention here is complete and unambiguous. Now, how is this power to be interpreted in the light of the next clause, which is ambiguous?

The two clauses must be construed together. The first part seems to express what the legislature intended, that after ten years, when the debased currency and the war prices, caused by the dying Confederacy, should have passed away and normal conditions should have returned, the city council should regulate the price of gas. The doubt resting in the language of the second ~~point~~ clause should not be interpreted to defeat this clear intention. The hands of the council should not be forever tied by this ambiguity.

The reservation of the public right to the council should not be made useless and of no avail from its inception. As said in the Freeport case, the second clause must be interpreted so as to make the reservation to the city "most favorable to the public, not in such manner as would so tie the hands of the council that the rates could not be adjusted, as justice to both parties might require at a particular time."

The court, by holding that appellant derived a contract in and by the ambiguous language would confessedly tie the hands of the council absolutely. Before 1875, the end of the ten years, appellant had voluntarily lowered its rates below the three dollars, thus confessing that without such voluntary action the city council might well have utilized its power immediately upon the expiration of the ten years. The fact that the legislature makes the reserved power in the city available only after ten years shows conclusively that the interpretation claimed by appellant must be rejected. If the legislature intended that for all time the city's power should be limited to the

three dollars, the act would have provided that from and after the date of its passage the city's reserved power would be limited forever.

It was in the minds of the legislature that in 1855 two dollars and two and a half were the reasonable rates to be charged by the Peoples' Co. That rates had become unreasonably low by the extraordinary condition caused by the war. But the rebellion was already engulfed in its own ashes, the legislature apprehended that in time conditions would be restored.

The three dollar rate would become unreasonable. The conditions in Chicago would always be more intelligently apprehended by the city council than by the State Legislature, its membership drawn mostly from rural counties. As it was certain conditions would change, the legislature determined that the charges should be *publicly regulated* to meet those changes.

It is evident that the legislature was looking to public regulation—that was in their minds.

This court has said in a case passing on the interpretation of these grants to public service corporations, that one reason for interpreting them against the corporation is that they are drawn usually with great care on the part of the agents of these corporations and with more or less good nature and heedlessness from the standpoint of the public.

There is no reason to suppose that the Peoples' Company's agents were any less active than in other cases. It is certain that the company was clamoring to get away from the two and a half maximum rate.

The legislature was willing to give it temporary relief, but wanted to arrange for a return to normal conditions,

and had resolved that the city council should determine when a change back would be reasonable.

The company's agents evidently prevailed on the legislature to delay its regulation for ten years, thus securing a good, long time within which to recover from war conditions.

This court has held, in the case of *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S., 238, that the facts surrounding the passage of a legislative act are useful in determining what is the meaning and scope of the act.

With this in view, an examination of the House Journal of the legislature of 1865 will be most convincing that appellant's claim is unfounded as to deriving any contract of ~~exemption~~ by its charter.

On page 391 of the House Journal of Illinois, 1865, it appears that on January 25th of that year one Mr. Childs offered the following amendment to that bill—it being House Bill No. 134 of that session:

> "Insert: '*Provided*, the present rate of charges for gas shall not be increased longer than two years from the passage of this act; and further, that no charge for the use of gas [or] meters shall be made during that time, and during that time (the company) shall not charge more than four dollars per thousand feet."

By this it appears that at that date the company's agents had secured the repeal of Section Four of the old act by which the maximum rate of two dollars and a half was fixed as the limit, and the company was to have the right to charge a higher rate. Mr. Childs is trying to limit the duration of the over-charge to two years, and trying to limit the higher rate to four dollars.

Undoubtedly discussions took place, and hot ones.

Mr. Childs did not succeed in getting his two-year lim-

itation, but a compromise was effected, the rate was to be unlimited (unless legislature interfered) for ten years instead of four dollars for two years.

It must be admitted that the Gas Company's people got the best of Mr. Childs, but his efforts have served well to show how this provision must be interpreted.

After the ten years the city is to have the right of regulation. The old Gas Company was not endangered thereby, that regulation must be reasonable, under the common law.

Being reasonably certain of the particular legislature the company's agents threw in the last clause, that pending the ten years, the city should *in no case* be authorized to reduce the gas rate below three dollars, hoping thereby to check subsequent legislatures.

Under all these circumstances it is clear that the mention of the rate of three dollars is, in the light of the Georgia Banking Co. case and the Rogers Park Water Company case, only the expression of the legislature that at that time, and for the following ten years, three dollars is a reasonable rate. But there is no contract that the legislature will never delegate its rate-fixing powers to the municipalities of the state, generally.

And there is no provision that the City of Chicago will, *at no time* after the ten years, have the power to regulate below the three dollars.

The language must be construed in favor of the public reservation, and therefore the court will hold that the three-dollar limit is only intended to last during the ten years.

It is conceded by counsel that the legislature retained the right to regulate at all times, therefore they must concede that it retained that right during the ten years.

The company's agents, fearful that at a subsequent session the legislature might think better of it, then secured the proviso that *in no case* (no matter how soon conditions would be restored) would the legislature authorize the City Council, prior to the time it was to take full charge of the regulation, to lower the price below the sum of three dollars. The legislature was willing to postpone the lowering of the price by the city below three dollars, for ten years.

It is not necessary to discuss whether the proviso to that effect was or was not valid, but that is certainly the strongest interpretation appellant can ask.

Any more favorable interpretation would defeat the legislative will, already clearly expressed in the first part of the provision, would resolve all doubts in favor of the corporation and would so tie the hands of the public that "the rates could not be adjusted, as justice to both parties might require at a particular time."

The agents of the company were so far successful that they had color of claim that they had postponed the evil day for ten years.

The court will not so construe the act that evil intentions can be charged against the legislature of that day.

It will construe the act as a legislative expression that in 1865 three dollars was a reasonable rate for gas, and that under all due conditions such rate would be reasonable for ten years. No other interpretation, it is submitted, could be put upon the section, without imputing evil motives.

Certainly such an interpretation will not be made as will show the legislature to have been masquerading, pretending to reserve to the public an important governmental function, and at the same time so framing it as to be on its face a pretense and a fraud.

Appellant assumes to believe that the legislature intended to protect the company from unconscionable and one-sided regulation by the council.

But if such danger were in their minds why reserve any power at all to the council?

There was no necessity for such action, if such danger existed.

If such were the case, why reserve any power to the city at all; why not retain the governmental right exclusively in the state, as by the former Act of 1855, whereby all that the city was given was the right in its consent —ordinance to retain such contractual right as the company would agree to?

From every standpoint that can be taken, it is evident that the legislature intended to reserve to the city this governmental power after the ten years, and that a power in the city must be so interpreted as to be a going power, not a mere masquerade and pretence.

Moreover, the assumed danger which appellant says was sought to be avoided never did and could not exist.

This court has from the earliest decisions preserved the public right to regulate rates. It is held to be a branch of the police power of the state. Where interpretation is necessary, the court has always decreed the right to be retained in the public.

Those interpretations all aid our contention, because this Act of 1865 is a grant to the gas company and, by

this Section 3, the right is reserved in the city. The same favorable interpretation must be given to this reserved right as if in terms it was reserved to the state itself.

If this right were fraught with danger to property rights, as argued by counsel, would this court have adopted the rule of invariably interpreting any doubt in favor of the right?

The pretense that the object of the legislature was to protect the People's Company from a danger falls of its own weight.

Under the common law such a corporation was protected against any danger. The right of regulation always rested in the public, but the regulation must always be reasonable.

Stone v. *Farmers' Loan and Trust Co.*, 116 U. S., 307

Providence Banking Co. v. *Billings*, 4 Peters, 514.

Stone v. *Illinois Central R. R. Co.*, 116 U. S., 347.

But counsel expressly admits that the legislature retains the right to regulate rates after the Act of 1865. It would seem that this concession was forced out as a second attempt to escape the odium of maintaining a claim of right to charge this unconscionable sum of three dollars perpetually.

Appellant says, "Oh, no, the city has no right to lower the rate below three dollars at any time (will the court note that any attempt to state appellant's position so that it sounds in the least plausible forces the interpolation of the words "at any time" into this clause in Section Three? In fact, counsel, in his argument, to make

his position reasonable, is forced to the same interpolation—the words themselves do not appear in the act, nor do any equivalent words) but the state retains the right to regulate the price, so no claim can be raised that an unconscionable monopoly was created."

But it is a late repentance. The concession is made not to recognize public rights, but to ward off the effect of a claim so far against public policy and against the rulings of this court.

It is difficult to see how appellant's position can be maintained.

When it concedes the fact that the legislature has not parted with the power to regulate, it surrenders its claim to a contract.

The power to regulate means the governmental power of regulation, a branch of the police power undoubtedly, to be exercised at subsequent sessions of the legislature, according to the discretion of the legislators of that day.

In their discretion those legislators undoubtedly would have the power to delegate this authority to the municipalities themselves. Therefore you have appellant in the impossible position of conceding legislative authority unsurrendered and claiming its surrender in the same breath. It is a very different matter to say that the legislature can contract with a gas company that it shall maintain a certain rate, unaffected by legislative action, for a given time, and to say that the legislature can itself retain the right to regulate and yet have no power to delegate that right to the municipality, its agent.

It cannot be said that the legislature retains the right to regulate, yet has bartered away the discretion of future legislatures, as to how that right of regulation shall be enforced.

The court, in the New Orleans Gas Light cases, 115 U. S., has said that the legislature can make the contract direct, but it has never said, and we respectfully submit it will never say, that the legislature can so barter away the governmental discretion of future legislatures. Forced by the necessities of its position in maintaining a claim so obnoxious to the uniform attitude of this court on such questions, as well as by the clear language of the act itself, appellant must concede that the legislature has not parted with the right of regulation.

The concession carries with it one that the legislature has not parted with the right of delegation; otherwise the right of regulation would not exist.

But when the statement is made it is but another way of expressing the rule of this court that all grants to these corporations must be construed against the corporation, and that a surrender of this governmental power is never implied, but can only be found from exact and unmistakable language.

By counsel's concession we come to the same point:

The act of 1865 gives no contract of immunity to the original People's Company. By the same reasoning and on the strength of the same authorities, the city is given thereby the full power of regulation after 1875.

II.

Appellant's second claim is that, having voluntarily accepted the provisions of the Act of 1897, and having entered into a merger with the other companies enumerated, the Consolidated Company now has a contract to charge the rate of one dollar forever, so far as the city is concerned.

It can reach this conclusion only in one of two ways:

First: It must read into Section 3 of the Act of 1865 the explicit and unmistakable words which this court requires shall appear in an act in order to work a surrender of this governing power. It must read into the Act of 1865 the provision that the legislature will never at any time permit the city to lower the price below the sum of three dollars, and that if the People's Company enters into any combination or consolidation or otherwise changes its form in the future, the legislature will never permit the city to lower the price of gas below some other sum in some way fixed at the time of such consolidation.

There can be no successful contention but that this language must appear in the Act of 1865, if appellant is to enjoy a contract to charge one dollar, free from regulation by the city, otherwise than by the explicit language of the Act of 1897. In the same way that, under the Act of 1865, it can enjoy no immunity from city control except by explicit language of the act itself, so if the Act of 1865 does not explicitly provide for the contingency of a consolidation, sale, lease or merger, the language of the Act of 1897 must anew, by explicit and unmistakable language, give appellant the much desired immunity.

This court has forever settled the status of those companies, claiming immunities after consolidations, sales, foreclosures, assignments, leases and all other changes, in a long line of cases, the Lexington Turnpike case and others, which we will discuss in another place. Under these decisions, the immunity, if any, given by the Act of 1865 will be lost upon a consolidation such as has occurred here, unless the Act of 1865 expressly provides that that immunity shall extend to all future changed conditions and transfers.

Granting for the sake of the argument that immunity for all time was granted by the act of 1865 to the old company, not one word appears, extending or attempting to extend such immunity to any new or consolidated or merged company. Under the Act of 1865, therefore, the immunity, if it ever existed, is lost.

II. As no explicit language in the Act of 1865 carries the immunity claimed over to the consolidated company, appellant must derive its contract, if any it has, from clear and explicit language granting the same in the Act of 1897.

The sum selected by appellant as that covered by its alleged contract is obtained by the provision of the eleventh section of the act, wherein it recites that the consolidated company shall charge no larger sum than the lowest sum charged by it during the year preceding the consolidation. Appellant states that sum to be one dollar.

In order to maintain its position, appellant must show in the act plain and explicit language to the effect that the consolidated company is thereby vested with the power to charge the rate found, as provided in Section 11, for all time, without regulation by the public.

Not one word of that nature appears and not one word in the most remote degree treating of any right in the company to any particular rate for any particular time, and not one word limiting regulation at all, either in the state or city.

And in the face of the uniform decisions of this court that only by the most certain and explicit language can this important governmental power be surrendered, and of the equally certain and uniform decisions that only by explicit language to that effect in the original act can a right of immunity in one of these corporations go to a

successor or into a merger or consolidation, appellant disregards the complete silence of both these acts on the subject and still claims.

It is respectfully submitted that, even if any immunity ever existed in the old People's Company, in the failure of both these acts to empower the old company to carry its immunities into the consolidated company, or to preserve the immunities when entering into a merger, and in the failure of the Act of 1897 to create any new immunity in any consolidated company, the appellant, having taken advantage of the Act of 1897, is now without the immunity charged.

Section 11 of the Act of 1897 reads as follows:

> "Any corporation * * * into which any company or companies are consolidated and merged under this act * * * shall be subject to the following provisions:
>
> "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such * * * consolidation and merger."

Under the decisions of this court, in order to sustain appellant's contention, words must be read into the section of which not a hint appears now.

The following words must be read into the section: "And such corporation, upon such merger and consolidation, shall, during the life of its franchise (perpetually) maintain such charge without regulation or lowering of the same, at any time, by the legislature or City Council."

But again appellant concedes that the legislature retains its right to regulate.

But appellant, denying that the city has any power to regulate from the legislature, and conceding that the leg-

islature retains the right to regulate, still maintains that it has an irrevocable contract!

Is it possible that appellant means that the old provision of the Act of 1865, as interpreted by it, and with the implications claimed by it to run with such act, are to be implied as a part of the Act of 1897, so that the court must add to that Section 11 such words as are suited to establish appellant's claim, running about as follows:

"And such corporation shall, upon such consolidation, perpetually maintain such charge without regulation of the same by any municipality, but subject at all times to regulation by the state?"

But there is no authority for vesting any contract of immunity in appellant by implication, and such course is impossible under the decisions. Moreover, granting that appellant could derive such a contract from the Act of 1897 by implication, there is still no contract for anything that can be implied from the language. There is no language from which can be implied an agreement by the legislature that no delegation of the regulating power to municipalities theretofore made and none that might be made thereafter should in any way affect the right of a company taking advantage of the act to forever exact the rate fixed by Section 11 of the act. In the absence of such language, it is respectfully submitted, no contract has been derived by appellant from the Act of 1897.

III.

The Act of 1865, it is respectfully submitted, reserves to the City of Chicago the governmental power, after the year 1875, to fix the rates for gas to be charged by appellant during the life of its charter.

It is to be noted that in construing the city's powers under the Act of 1865, the rule urged by appellant in its brief, that the city only derives such powers from an act of the legislature as are expressly given or necessarily implied, does not apply, and none of the cases cited by appellant are in point in discussing this branch of the case. This is true, because, as we have seen, the Act of 1865 is a grant to this public service corporation, and all doubts must be construed against the corporation, all intendments taken most favorably for the public and all ambiguity interpreted in such manner as to vest power in the public.

This is so, because after 1875 the city takes the place of the state, the legislature expressly reserving the regulating power to the city after that date.

The act is, first and foremost, a grant to the corporation; the city's right is not a grant, it is a reservation of the governmental power of check on the *quasi* public corporation. In the same way that appellant must show its pretended contract by explicit and unmistakable language, so in interpreting this reservation of the governmental power, the language, where ambiguities arise, will be interpreted so as to vest in the city a useful and available power. A power, to use the language of this court in the Freeport Water case, which the city can employ to adjust the rates, "as justice to both parties might require at a particular time."

We believe that on no subject are the opinions of this court fuller and more explicit than in holding that in all questions of power reserved, between this class of corporations and the public (here the city), all interpretation and construction must be such as to uphold the power of the city.

The legislature has the right to fix the rates charged by those corporations serving the public, as gas companies, water companies, railroads and the like, the only limit being that, as regulated, they must be reasonable. Where the right has been reserved in the city, as in this case, the same rule prevails.

Ga. Banking Co. v. *Smith,* 128 U. S., 174.

C., B. & Q. R. R. v. *Iowa,* 94 U. S., 161.

Stone v. *Farmers Loan and Trust Co.,* 116 U. S., 307, and following cases.

San Diego Land Co. v. *National City,* 174 U. S., 739.

Covington and Lexington Turnpike Co. v. *Sandford,* 164 U. S., 578.

Budd v. *New York,* 143 U. S., 517.

Freeport Water Co. v. *Freeport City,* 180 U. S., 557. and following cases.

Barbier v. *Connolly,* 113 U. S., 27.

Logansport Gas Co. v. *City of Peru,* 89 Fed. Rep., 185.

Ruggles v. *Illinois,* 108 U. S., 526.

Lake Shore v. *Smith,* 173 U. S., 684.

Wisconsin, M. & P. R. R. v. *Jacobson,* 179 U. S., 287.

Smyth v. *Ames,* 169 U. S., 466.

Reagan v. *Farmers L. & T. Co.,* 154 U. S., 362, and those following.

Spring Valley Water Works v. *Scottler,* 110 U. S., 347.

Chicago & Gd. Trunk Ry. v. *Wellman,* 143 U. S., 339.

St. Louis & San Francisco Ry. Co. v. *Gill,* 156 U. S., 652.

Brass v. *Stoeser,* 153 U. S., 391.

We have quoted the language of many of these cases under the first head of our argument, and each case is conclusive of the city's reserved right to regulate rates charged by appellant.

In all the cases cited by us the language of the various acts is much clearer for the meaning claimed by appellant than is that in the Act of 1865, yet in each the right in the city is upheld, and the most that is ever said as to the rates specifically named in the act is that it is the mere expression of the legislature or city council that the specific rate named is for the time being reasonable.

It is invariably held that the fixing of the particular rate, as in this act, is never an exhaustion of the power to regulate and never a limitation against future lowering when the same becomes necessary to secure a reasonable rate.

The same cases are equally uniform that a grant to a public service corporation, reserving such power in the city, must be interpreted so as to make the power available to secure just rates at all times.

To hold that we do not obtain by the act a full and untrammeled power of regulation is to overlook entirely the language of Section 3.

The legislature having removed the limitations of 1855, first vests in the city, in direct language, the right to fix rates. Then comes the ambiguous clause.

To deny the city's full power is:

First. To defeat the clear reservation of power first given by an interpretation of the doubtful clause inimical to public rights.

Second. The court must add to the actual language used as follows: "either before or after the expiration of said ten years, and at no time will the right of regulation of rates to be charged by gas companies be delegated to the cities, villages and towns of this state."

Third. The court must overlook the meaning necessarily implied by appellant's interpretation: "but such power of regulation shall not permit the common council to lower such price to a reasonable rate."

The first clause of the act needs no interpretation. It is:

"But ten years after the passage of this act the common council of the City of Chicago MAY, *by resolution or ordinance,* REGULATE THE PRICES *charged by said company for gas.*"

The court will not construe the next clause so that the intention of the legislature will be defeated and the plain reservation be made void.

The next clause reads:

"But said common council of the City of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

Here is doubtful language and appellant demands that it be resolved in favor of the company and against the public.

The first clause, complete in itself, must stand, and this last clause must be so construed as to carry out the clearly expressed intention of the legislature.

The proper construction must be given it so that it reads:

"But said common council of the City of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than [is reasonable, which at present is] three dollars per thousand feet."

This preserves the right in the public and carries out the intention of the legislature, and at the same time does full justice to the company. This charter is perpetual, and it would be an unconscionable construction that would disregard the tendency to a larger recognition of public rights as against those aggressive corporations, and would, by a unique interpretation of a doubtful phrase, hold that the state had forever found itself not to put the regulation of civic rates into civic hands.

This is the more manifest when it is remembered that at the time in question the dollars prescribed were legal tender dollars, *token dollars.*

The value of the token dollar of that date was not to exceed forty cents, the Civil War was still in progress.

In actual value, the act fixed the reasonable rate at that time at $1.20 per thousand feet.

This construction, which we believe to be the right one, is exactly in line with the decisions of the United States Supreme Court already stated.

Thus, in the Danville case, 180 U. S., 619, the charter fixed certain rates and provided that such rates should be paid continuously during the life of the charter, and that such rates were an "inducement to said water company to accept the provisions of this ordinance and *contract.*" Notwithstanding this language, the court finds the subsequent ordinance, materially lowering these rates, to be valid and binding.

The first rate, expressed, is merely the statement by the public that that rate is at the time reasonable. The power to regulate remains, to be exercised at any time it may be required to secure justice.

It is notable in this connection that appellant nowhere alleges either in its pleadings, nor by the argument of its counsel, that the rate of seventy-five cents is not a reasonable and just price to be charged.

It is arguing for the right to a perpetual monopoly, based on implications arising by technical and ~~immaterial~~ tenuous interpretation.

When these various charters construed by this court are read under the court's decision, the same or similar words are interpolated in each case, as appear in brackets in this second clause in our case. The court reads them in. In all these cases the court adheres to the doctrine that the rate expressly fixed in the ordinance or charter [or in the case at bar, in the act of 1865], is not an exhaustion of the power to fix the rate, it is merely the statement of the opinion of the Legislature that at the time the charter is given, the expressed rate is reasonable.

The last clause of this Section 3 can be read in three ways:

First: In the manner we argue for, which is to make the power reasonable, valid and something that the City Council could utilize for the benefit of all concerned and to secure just rates.

Second: It can be read, as counsel for appellant reads it, to mean that the Legislature agrees to protect the company from the City Council, and agrees that, for all time, the City Council shall get no power from future Legis-

latures which will enable the City Council to lower the price below three dollars.

This construction is contrary to all the principles governing legislative grants, because the Legislature cannot tie up the discretion of future Legislatures perpetually. It must be remembered that this is not a case where the Legislature has given a contract for a stipulated rate, as in the 115 U S., the New Orleans case. Here, no price is fixed at all, but it is claimed the Legislature contracts that no future Legislature will delegate the fixing of rates to the municipality.

The Circuit Court, in its opinion, stated that such a construction was inadmissible, that if such was the intention of the Legislature, the provison would last only until the next meeting of that body.

This must be so, particularly when it is conceded that the Legislature retains its power, unimpaired. If such is the correct reading of the clause it must fall, as being against public policy, leaving the first clause intact, that, after ten years, the City Council should regulate the price of gas.

Counsel, in making the concession that the Legislature retains the right of regulation, puts himself in no better position. He surrenders the *prima facie* reading of the last clause, and there is nothing left for him, but to interpolate words in a manner impossible.

He makes the clause read:

"But said common council of the City of Chicago is not hereby authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

By this construction the clause is entirely changed and meaning changed.

The clause, as written, does not say that the City Council "is not 'hereby' authorized."

It does not recite that the city's power is limited by itself—by the provisions in the clause and act itself. The city is not limited at all by the clause itself. The recital of the clause as actually passed is to an entirely different effect.

The clause is *in the future tense.*

To get this third construction, the word "hereby" is essential; it is indispensable, because unless the act itself fixes by clear and unmistakable language the immunity, there is none, the legislature cannot provide what the discretion of any future legislature may be.

In order to reach this third construction, the words "shall, in no event, be," must be gotten rid of.

These words fix nothing as of the present.

This meaning cannot be read into the act. Such meaning, to be reached even by implication, requires an absolute change of the language of the act.

The Act of 1897.

The city having the right to regulate rates under the Act of 1865, when the Peoples' Gas Company voluntarily took advantage of the Consolidation Act of 1897, and came under the general law, that power of the city was not lost.

There is nothing in the Act of 1897, that provides that any right of regulation in the city over any gas company which takes advantage of its provisions, is lost by such merger or consolidation.

Therefore, even if the city does not have the right to regulate under the Cities and Villages Act, it would con-

tinue to have the same right reserved to it by the act of 1865, after the Peoples' Company consolidated under the 1897 Act.

In this connection, we again call attention to appellant's difficulty in making the shift from its alleged contract for three dollars to the supposed new one of one dollar.

Counsel derives his claim to the one by the supposed agreement of the legislature that it would, *at no time* (words interpolated), empower the city to lower the price below three dollars.

He then takes this alleged agreement as to three dollars and tacks it onto the one dollar charged by the old company prior to the consolidation, and says, the legislature now agrees in some manner that it will never permit the city to lower the price below one dollar. But he must take the tail with the hide.

The old act provides:

"But ten years after the passage of this act the Common Council of the City of Chicago MAY, *by resolution or ordinance,* REGULATE THE PRICES *charged by said company for gas.*"

Appellant derives a contract, if at all, only from its old act, so it must retain in this one-dollar contract the first part of the old contract. He then interpolates "One" in the place of "Three," in the last clause, and the act is done.

But, by what "strict and explicit language" does the "One" get in the old contract?

Moreover, counsel admits that under no circumstances can his company ever go above one dollar, under Section 11 of the Consolidation Act.

He then maintains, as before, that the city is given the right to regulate, but will never be permitted to regulate above the price of one dollar.

But under Section 11, no higher price than one dollar being possible, appellant must gravely read its contract that the city is given a right to regulate a price which (under Section 11), can never be charged.

But this court will never so construe an act reserving a power of regulation as to make it a nullity—so appellant's claim of a contract as to one dollar by virtue of any grant under the Act of 1865, falls.

Its claim under the Act of 1897 also falls, because there is no such language in the act as is required by this court providing explicitly that this price fixed by the preceding years' charge shall forever remain a contract rate.

Under either act, appellant's claim of a contract fails.

This very situation is the strongest argument that the interpretation claimed by the city must be put upon the Act of 1865. Section three therein must be interpreted as an available power on the city, available perpetually as the franchise is perpetual.

It is respectfully insisted that the city still has the power to regulate gas rates under the Act of 1865, that it had that power in October, 1900, and that the exercise of that power in passing the seventy-five-cent ordinance complained of was a valid exercise thereof.

IN

THE CITY COUNCIL HAS THE RIGHT TO REGULATE UNDER THE CITIES AND VILLAGES ACT.

The right is derived from the last part of clause *thirteenth*, Sec. 63, Art. V, of the Cities and Villages Act, passed in 1872. That clause reads as follows:

The City Council shall have the power:

> "THIRTEENTH. To regulate the openings therein [in its streets] for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights. PROVIDED, HOWEVER, that any company heretofore organized under the general laws of this state or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may, by ordinance, impose."

It is obvious that the first sentence of clause thirteen stands by itself, and it is complete in itself.

It reads as follows:

> "To regulate the openings therein (in streets) for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights."

It has to do with openings in the streets and enumerates every kind of hole in the street that the legislator of that time was cognizant of.

The sentence is complete in itself. It gives the city complete control of the subject of openings in streets.

As we shall see later that was all there was of clause *thirteenth,* as the clause originally stood.

The rest of the clause must be read separately:

> "Provided, however, that any company heretofore organized under the general laws of this state or any association of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may, by ordinance, impose."

It does not deal with holes in the streets, it is an entirely separate provison.

It should have been a separate clause, and we will call it *sub-thirteenth.*

It is a general provision, giving City Councils the right to regulate gas companies in all their public relations and in their relations to the citizens of the place.

We submit that the language of the section is so broad as to include regulation of all the gas company's public relations, and, therefore, includes the regulation of gas rates.

To get the clear meaning of this clause we will analyze it;

"Provided, however, that any company * * * shall have the right, by the consent of the Common Council (subject to existing rights), to erect gas factories and lay down pipes in the streets or alleys of any city or village in this state."

We stop there because the power is complete—it provides for competition, any body of men or corporation can,

subject to existing rights, and subject to the consent of the City Council, start a gas company, instal a plant and lay pipes.

Nothing more need be added because the consent of the City Council includes the conditions as to opening the streets, etc.

And clause *thirteenth* already has given the city the right to regulate holes in the street.

But there is still another clause.

It reads:

"Subject to such regulations as such city may by ordinance impose."

It is obvious that this power delegated to the city is something different from the power given by clause *thirteenth.*

The court will not hold that the Legislature simply repeats itself, that the last clause is useless and without force or meaning.

Appellant argues that the last clause simply refers to the regulation of making holes in the streets.

But that is provided for by *thirteenth.*

Appellant cannot argue that the clause refers to the terms to be imposed when the city gives its consent to the gas company to start in business, the preceding sentence provides for the consent of the city.

This last clause is intended by the Legislature to delegate to the city the general power to regulate gas companies that come under the general law, in their relations to the public and to the inhabitants of the city, including the power to regulate the rates to be charged the inhabitants for the use of gas.

We submit that there can be no escape from this conclusion.

The court will not construe it to make the Legislature ridiculous.

It is no repetition, it must be held to give the city the general power to regulate.

The greater includes the less, and the general power to regulate must include the particular branch of regulation over rates.

The Supreme Court has construed a similar statute in the Water Cases and has held that general language, almost identical with this in clause *sub-thirteenth*, found in Section 9 of the Corporation Act, includes the particular power to regulate the rate charged.

Section 9 of the Corporation Act reads:

"The General Assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act."

In the Freeport water case, 180 U. S., 587, the court construes this section and says it includes the reservation of the right to fix rates.

In that case, the water company's counsel attempted to put a narrow meaning on the term "regulations," as is sought to be done here by appellant, but the court rejected that interpretation and applied the broad meaning to the word, as we claim for it here.

The court says in regard to this word "regulations" in Section 9, on page 596:

"The Supreme Court of the state in passing on the case not only considered the acts of the 9th and 10th of

April, 1872, regarding municipalities, but also, as we have said, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated, and it was held that the act 'must be regarded as entering into and forming part of the charter' of the plaintiff. The statute reserves to the General Assembly the power to prescribe in the government of corporations 'such regulations and provisions as it may deem advisable.' The language is comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it.

The Supreme Court of the state has construed it to be of greater import than the usual reservation of the power to alter or amend the charters of corporations. The plaintiff, however, contends that it was not intended by the terms, "regulations and provisions," "to interfere with the internal business arrangement of the corporation itself," but regulate "those classes of acts which control the relations existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the power of a corporation."

We think the construction is too narrow, the statute made no distinction between the internal and the external business of corporations—between their relations to stockholders and their relations to third persons. Such are but special exertions of power which the Legislature possesses."

But the use of the word "regulations," is as broad and comprehensive in this clause *sub-thirteenth*. We have seen that it cannot be construed to be a mere foolish repetition, referring to power over making holes. The

rights of these gas companies are: "Subject to such regulations as any such city * * * may by ordinance impose."

The Supreme Court says: "It is difficult to conceive what objects of legislation are not covered by it." The language is identical in each act.

The court says, that that Section 9 must be read into every charter of every corporation which comes under the general law.

It must be read into the charter of appellant, because it has come under the general laws by taking advantage of the Act of 1897.

The bill shows that appellant is a consolidated or merged company, formed by the old People's Gas, Light and Coke Company, joining with others under the Act of 1897.

By the provisions of that act, the merging or consolidating companies come under the general law.

For the same reason that Section 9 must be read into appellant's charter, under this clause *sub-thirteenth*, it must be held that the City Council has the right to pass and enforce this seventy-five-cent gas ordinance. Even if it had not such right under the Act of 1865.

The court must not only disregard its own decisions in construing precisely similar language, in a statute passed at the same session of the Legislature as this one was, but it must close its eyes to the common sense of the very section itself, in denying this reasonable construction, and finding for appellant, that under clause *sub-thirteenth*, the general power "subject to regulation," only has to do with regulating holes in streets.

Appellant is fighting for a monopoly—it claims the

right to charge an onerous rate perpetually. It does not claim that the seventy-five-cent rate is unreasonable, it must be held on the face of the pleadings that the rate of seventy-five cents is reasonable.

It is, therefore, in the position of demanding here that the Act of 1865 shall be construed against the public and in favor of a public service corporation in order to hold up an unreasonable rate perpetually, and that for the same laudable purpose the Cities and Villages Act shall be given a strained interpretation in the face of the decisions of the Supreme Court.

Facts Surrounding Passage of Cities and Villages Act.

Again following the views of this court, expressed in the Potomac Telephone case, in 186 U. S., 238, we must regard with value the facts and circumstances surrounding the passage of this Cities and Villages Act.

In the legislative session of 1871-1872 (which the learned Chief Justice will remember as the Fire Legislature, with John N. Jewett, William H. King, "Jim" Root and many other notables among the members) this act was introduced and passed as Senate Bill No. 178.

From the journal of the senate, on page 240, it appears that the bill was introduced on February 23, 1871, by Mr. Edsall.

On page 416 of the journal it appears that on March 22, 1871, Mr. Epler offered the following amendment to Senate Bill 187. Amend Subdivision 13, Section 1, Article V, by adding:

> "Provided, however, that any company heretofore organized, or which may be hereafter organized, under the general laws of this state, or any associa-

tion of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas, to supply cities or towns, or the inhabitants thereof, with the same, shall have the right (subject to the existing rights) to erect gas factories and lay down pipes in the streets or alleys of any city or town in this state (having a population of not less than five thousand inhabitants), subject to such sanitary regulations as any such city or town may impose, through its board of health."

It will be seen that this is the very proviso, as amended by Mr. John N. Jewett, that is now before the court.

By page 417 it appears that on March 22, 1871:

> Mr. Beveridge offered the following amendment to the amendment offered by Mr. Epler, which was lost:
>
> Amend amendment by making its provisions only applicable to cities and villages organized under this act.

It further appears on the same page that on the same day, the question being the adoption of the amendment to Senate Bill No. 178, offered by Mr. Epler, Mr. John N. Jewett offered the following amendments, which were adopted:

> Strike out the words, "having a population of not less than five thousand." Also, strike out the word "sanitary." Also, strike out the words, "through its board of health," and add the words, "by ordinance," before the word "impose," in the last line.

Mr. Epler's amendment, as amended, was then adopted.

Mr. Reddick moved the previous question, the question being upon ordering the previous question, and the yeas and nays being demanded, it was decided in the affirmative, as follows: Yeas, 27; nays, 13.)

On page 28, second volume, it is shown that on No-

vember 16, 1871, on motion of Mr. Underwood, Senate Bill No. 178, for "An act for the incorporation of cities and villages," was taken up and referred to the committee on municipalities.

It further appears, on pages 226 and 227, second volume, of the journal, that on December 20, 1871, this bill, 178, passed the senate, and, on page 898 of the journal, that on April 8, 1872, the bill was duly enrolled.

On page 161 of the Senate journal it appears that on January 31, 1871, the same Mr. Epler who subsequently added this *sub-thirteenth* clause to the Cities and Villages Act, introduced Senate Bill No. 97, for "An act in relation to the establishment of gas companies."

It further appears, on page 336 of the journal, that on March 9, 1871, Mr. Epler, from the committee on judiciary, to which was referred Senate Bill No. 97, for "An act in relation to the establishment of gas companies," reported the same back, and recommended its passage.

On page 567 it appears that on April 13, 1871, this Senate Bill 97 was read a second time, and that thereupon Mr. John N. Jewett offered the following amendment:

> "Amend Section 1, as follows: 'After the word 'shall,' at the end of the fifth line, insert the words 'by and with the consent of the corporate authorities of such cities and towns.' Also, strike out the word 'sanitary,' in the eighth line, and the words 'through its board of health,' in the ninth line, and insert the words 'by ordinance' before the word 'impose,' in the ninth line."

Mr. Edsall offered the following amendment to the amendment:

> "Add to Section 1: 'Provided, that such regulations shall be uniform and operate equally upon all gas companies who desire to supply any such city

or town with illuminating gas, and no discrimination shall be made in favor of or against any particular company.' "

The bill and amendments were referred to the committee on judiciary.

From page 38, second volume, of the journal, it appears that on November 17, 1871, Senate Bill No. 97, for "An act in relation to the establishment of gas companies," was taken up, read at large a second time and referred to the committee on municipalities.

It further appears from the house journal of the same session, on page 288, that on February 16, 1871, a bill, House Bill No. 190, for an act in relation to the establishment of gas companies, was introduced, and, on page 350, it is shown that on February 16th the committee on corporations recommended that it be not passed.

On page 384 it appears that on February 22d House Bill No. 333, for an act in relation to gas companies was introduced, and, on page 605, it is shown that on March 16th the committee on corporations recommended that it do not pass.

It is earnestly submitted that this short history renders it conclusive that this proviso in clause *thirteenth* was intended by the legislature to give something more to the city than the mere right to regulate holes in the street, as claimed by appellant. It was intended to give it governmental power.

The other language in this act, as we have seen, covers all other lines of control.

The only way that this last clause, "subject to such regulations as any such city or village may by ordinance impose," can be made effective and available (and this

court always construes acts in regard to public rights so that they will not be useless) is to follow the court's decision in the Freeport water case, 180 U. S., and interpret the proviso, clause *sub-thirteenth*, as a going section of the act, giving the city the right to regulate rates.

The progress of the act shows this clearly.

The Cities and Villages Act was introduced on February 23, 1871. On March 22, 1871, Mr. Epler proposed that clause *thirteenth* be amended by adding this clause *sub-thirteenth*, but it was then in a weak and comparatively helpless guise. It remained for Mr. John N. Jewett, whom the court knows to be of the most undoubted standing, both as man, citizen and lawyer, to so amend the proviso that it became an available and regulation-giving instrument in the hands of the city.

As originally offered the right of the city was confined to "such sanitary regulations" as should be imposed by the Board of Health.

As changed by Mr. Jewett and passed, the language reserving the limited power in the city was changed, giving the city the unlimited and general power recognized by this court in the Freeport case.

It was changed to read: "Subject to such regulations as any such city or town may, by ordinance, impose."

It was certainly intended to reserve to the city every regulation that can naturally be imposed "by ordinance." The regulation of rates comes under that head.

But this interpretation, already certain, becomes more so when it appears that this proviso, this clause *sub-thirteenth*, is really Senate Bill 97.

That was a bill applying to gas companies only, and was introduced on January 31, 1871, by Mr. Epler. It was referred to his committee, the Judiciary Committee.

On April 13, 1871, Mr. John N. Jewett proposed certain amendments and by comparing such amendments with those already proposed by him to this clause *sub-thirteenth* on March 22nd, it is seen that Section One of Bill 97 was identical with the present clause *sub-thirteenth.*

In other words, this clause *sub-thirteenth,* was intended by the legislature to take the place of a separate act, giving cities a right to regulate the price of gas.

We submit that there can be no escape from this conclusion, because, if passed as Bill 97, clause *sub-thirteenth* would appear, not as a proviso, as it is in its present form, but as a separate act.

It would then read:

"Any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas to supply cities and villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may, by ordinance, impose."

Reading this section with Section 9 of the corporation act (which was passed at the same term of the Legislature), we see that the language, so far as giving power to the city is concerned, is identical.

This court, as we have shown, has already decided in the Freeport case, 180 U. S., that the language of Section 9 includes the right to regulate rates.

We submit that the same language here should be given the same force.

These conclusions are more certain when it is remembered that the cities and villages act was re-referred to the committee on municipalities on November 16, 1871, and that the gas bill, No. 97, was, on November 17, 1871, referred to the same municipalities committee, although up to that time it had always been referred to, and in the hands of, the judiciary committee. These ear-marks cannot be mistaken; the senate sent the separate gas act to the municipalities committee, in order that it might be incorporated into that act.

It was incorporated therein as this clause *sub-thirteenth*, and it must be given the same effect as if it were a separate act.

Appellant argues that this clause must be limited by the context of clause *thirteenth*, but the reading of *sub-thirteenth* shows that to be an untenable position, and the history of its passage shows that it must be interpreted as a separate act.

It is submitted, however, that the intention of the legislature was clear that they were giving the city a rate-regulating power by the clause *sub-thirteenth*. The amendment proposed by Mr. Edsall to this clause when it was still senate bill 97 shows that the legislature well knew they were giving the city the rate-regulating power. The amendment to Mr. Jewett's was that "such regulations shall be uniform and operate equally" on all companies in the city and that "no discrimination shall be made in favor of or against any particular company."

This amendment by Mr. Edsall would not have been thought of by him if it had not been the known intent of the legislature that this clause, *sub-thirteenth*, should give the city affirmative and available power, the power to regu-

late rates. If the only object of the proposed clause had been to repeat the already fully-expressed power to control the making of holes in streets, Mr. Edsall would not have proposed his amendment.

It was an important enactment, giving governmental authority to the cities, and careful supervision was given it.

The fact that Mr. Edsall's amendment was not adopted cannot be urged against our interpretation. The amendment was not needed. The law would impress upon the act, without positive language to that effect, that the application of the act must be uniform.

At the same session of the legislature other separate gas bills were introduced and defeated, from which it may be argued that the agents of the old People's Company were so active and successful that the separate measure, bill No. 97, could not pass, and that the public-spirited senators, headed by Mr. Jewett, forced the passage of this act, so important to the inhabitants of cities throughout the State, by tacking it to the cities, villages, and towns act, which the pro-gas men dared not defeat.

The passage of this bill 178, the cities act, could not be delayed, because this was the first session of the legislature under the constitution of 1870, and these general acts were very essential, the legislature being prohibited by the constitution from passing special acts on any subject.

Appellant in its brief seems to take the position that this act, clause *sub-thirteenth*, if valid, would only apply to companies incorporated under the general law, but the reading of the act shows the contrary to be true.

Clause *sub-thirteenth* provides "that any company heretofore organized under the general laws of this State, or any association of persons organized or which may be hereafter organized" for the manufacture, etc., of gas. This language

is certainly broad enough to include the appellant company and the old People's Company.

Since the adoption of the constitution of 1870, and the passage of the corporation act of 1872, it is common to make a distinction between corporations under the general law (of 1872) and corporations created by special charter (granted before the constitution of 1870).

But this meaning cannot be taken of the language "general laws" in clause *sub-thirteenth*, because no corporation could be created under the "general law" prior to the passage of this cities act, because the corporation act and the cities act were both creations of the legislature of 1871–'2.

Obviously the expression can be taken only as meaning any corporation theretofore organized by the legislature of Illinois in the regular method of granting charters. The language "any association of persons organized" for the purpose of manufacturing, etc., gas, would also include the old People's Company.

The history of the passage of this act (*sub-thirteenth*) further shows that it was intended to be general in its application.

It appears by the Senate Journal, as shown on page 44 of our brief, that one Mr. Beckwith proposed an amendment providing that this clause, *sub-thirteenth*, should apply only to cities incorporated under the act then in process of formation, under senate bill 178, but the amendment was promptly voted down. This not only shows that the act was to be general in its application as to companies as well as to cities, but also is further conclusive evidence that the act was intended to give the rate-giving power; because if it only applied to regulating holes in the streets, why would amendments be offered that it should not apply to cities incorporated prior to 1872?

Was not some timid or over-zealous friend of gas attempting thus to protect the old People's Company and others from rate regulation under the act?

Such friends had tacked the ambiguous last clause upon section 3 of the act of 1865, hoping thereby in a humble way to "help out." Was not this amendment a continuation of the same zeal?

The cases of City of Joplin *v.* Southwest Missouri Co., decided at this term of court and now published in the advance sheets of the reports as of the 191 U. S., 151, and of Owensboro *v.* Owensboro Waterworks Co., published as of the 191 U. S., 358, are, we submit, conclusive of the case at bar, not only on the point that appellant has no contract, but also on the point that the city has the power of regulation both under the act of 1865 and under the cities and villages act of 1872, this clause *sub-thirteenth*.

Thus, in the Joplin case, the court's reasoning applies to our case, and the court, passing on the company's position, say that if correct it would leave the city with "a useless potentiality."

So here appellant admits the right of the city to regulate rates, but only above the sum of three dollars under the act of 1865, and above the sum of one dollar under the act of 1897. Truly "a useless potentiality." And here, as there, the court will reject such an interpretation of the ambiguous language and such a claim of immunity, founded on implication.

In that case, under the statutes of Missouri, the city could contract with private parties to furnish light or could construct a plant of its own.

Appellant granted a franchise to the appellee company, and during the life of the franchise began the construction of a plant of its own.

The lower court enjoined the city on the ground that the construction of the city's works was an impairment of appellee's contract, and the co[illegible]reversed the decree upon the ground that there was no express language in the statute or in the city's ordinance that the city could not elect to construct its own works, notwithstanding the previous franchise.

The court says:

> "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which would give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot the city is left with a useless potentiality while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

In Owensboro *v.* Owensboro Waterworks Co., 191 U. S., 358, the ordinance was expressed to be binding upon the city as a contract, and "the measure of the rights and liabilities of the city and of the water company."

The city subsequently lowered the rates, and appellee urged:

1. That the lowering of the rates impaired their contract.

2. That the city had no power to fix rates.

The court decides the issues in favor of the city on the strength of the Stone cases, in the 116th U. S., and the Water cases, in the 180th U. S.

We invoke the same reasoning and the application of the same principles to the case at bar in favor of the same public right.

Appellant argues that this clause *sub-thirteenth* is only a proviso and a part of clause *thirteenth*, and that the powers given to the city in the proviso must be limited by the context—that is, that no wider powers are given than are embraced in the subject-matter of clause *thirteenth*, to-wit, holes in the streets. But on the face of the section, this conclusion cannot be a valid one. This court has passed on the force of statutory enactments, in form of provisos, and in cases like this clause *sub-thirteenth* interpreted them as independent acts, conferring power wider than that treated of in the text of the original act.

Georgia Banking Co. *v.* Smith, 128 U. S., 174.

Chesapeake and Potomac Tel. Co. *v.* Manning, 186 U. S., 238.

V.

Even if the original People's Company enjoyed, under the act of 1865, the immunity from regulation claimed by it, nevertheless when it went into the consolidated company, under the act of 1897, that immunity was lost.

The act of 1897 was passed for the purpose of evading the force of the opinion of the supreme court of Illinois in the Gas Trust case, 130 Illinois, referred to in another place.

A previous attempt to consolidate by these same companies, or some of them, into what was called the Chicago Gas Trust Company was declared illegal, and the legislature was asked to pass this act of 1897 to legalize the same thing.

The language of the act legalizes a sale, lease, or merger, and the effect of the act is made the same, whatever form the consolidating companies choose to take.

In this case counsel concede that the form pursued was a merger or consolidation.

After, in various sections, directing the methods to be pursued, the legislature, in section 9 of the act, provides what effect the consolidation shall have on the constituent companies, and how the obligations of those companies shall be met by the new consolidated company.

It will be noted that all the constituent companies are affected alike by going into the merger; that there is no difference resulting whether one particular company or another is chosen as the one whose name is to survive.

Eliminating the language bringing in the purchasing or leasing companies, section 9 reads:

> "§ 9. * * * *Any consolidated corporation*, as authorized by section 2, shall be subject to and shall perform for each of the companies so entering into said agreement or agreements, the legal obligations *now resting upon each of them*, respectively, under their respective charters and ordinances, except where the provisions thereof conflict with the exercise of the powers herein granted, in the same manner and to the same extent as if the companies had remained individual and distinct; and such performance by * * * such consolidated corporation, shall be held and considered as the performance by each of the respective companies so * * * consolidating, of the legal obligations theretofore resting upon each of them respectively: *Provided, however*, that nothing in this act shall be construed as extinguishing *said companies* entering into the agreement or agreements mentioned in this act, or annulling or impairing any of their respective franchises, licenses, or privileges, but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity ever exercised or enjoyed by any of them may be necessary for the protection of their respective creditors or

> mortgagees, or any of them; the *separate exercise* of their respective powers, and the *separate enjoyment* of their *separate* privileges and *immunities being suspended* until the *protection of such creditors* or *mortgagees* shall require their resumption, when *such suspension shall cease*, so far as, and *for such time as*, the protection of such creditors or mortgagees may require."

The language is specific, we submit, that the acceptance of the terms of the act has the same effect on all the constituent companies, no matter which one survives in name. Appellant argues that the old People's Company remains intact because its name is used in the merger, and consequently that its pretended immunity survives, but the consolidated company would be the same entity it is now and have the same powers (and none others) if the name of any of the other constituent companies (the Chicago's, for instance) had been retained. There is no difference made in section 9 between any of the constituent companies. All are on the same basis, whether the name of the one or the other is used for convenience. Section 4 has to do with the manner in which the merger or consolidation shall be brought about, and in so doing, as to the merger, provides that the directors "* * * of the companies proposing to consolidate and merge into *a single corporation*" shall take certain steps.

Then section 9 provides that "any consolidated corporation" shall perform the legal obligations of the constituent companies, the disappearing companies being absolutely on the same basis with that one whose name is retained in the consolidated company.

The section goes on to provide that the performance by "such consolidated company" shall be held and considered

as the performance by each of the respective companies "so consolidating."

It is impossible to say after this language that any one company remains identical with the old company "so consolidating," and the other companies "so consolidating" are the only ones disappearing.

All constituent companies are on the same basis. The consolidated company is identical with neither of them. It is the successor of each. It derives its life entirely from the act of 1897.

Without that act it could not come into being, and under section 9 of that act it is shorn of the immunities of each and all of the constituent companies.

To read section 9 as appellant would have it read, so as to preserve the immunities of the old People's Company, would be to change the language absolutely. Under the decisions of this court, in order to vest a successor or consolidated company with the immunity of one of the constituent companies, exact language to that effect must appear in the act. There is none in this act.

The section reads: "*Provided, however*, That nothing in this act shall be construed as extinguishing said companies" entering into the consolidation.

Here no difference between them is made by "exact language." "Said companies" refers back to "each of the respective companies." All are on the same basis. The immunities of the company whose name remains with the consolidated company are on the same basis as those of the company whose name is dropped.

They are all the immunities of "said companies."

Not only is the language of the act not susceptible of being construed as retaining the consolidated People's Com-

pany identical with the original People's Company, but such an interpretation would give an unconscionable opportunity for fraud in the manipulation of these consolidations, as we point out elsewhere.

This court will not so construe the act of 1897 as to make it an engine for fraud.

It will be construed as enabling rival companies to unite and do away with duplicate expenses, but not as enabling conscienceless schemers to use one high-charging corporation to combine with others limited by their charters to lower rates, and so by combination to make an advance in rates which by law the constituent company was forbidden to do.

It makes no difference that the old People's Company may have voluntarily reduced its rates, so that the rates of all the constituent companies had become practically the same, the act must be construed to fit all cases and that interpretation reached which will protect public rights at all events. The interpretation must be the same as if the old People's Company had continued to charge the three dollars up to the date of consolidation. The principle would remain the same. Section 9 provides explicitly that all immunities of all the constituent companies would be lost when they go into the consolidation.

It says the act shall not be construed as extinguishing the "respective franchises, licenses or privileges" of "said companies," but "they ('said companies,' the old People's as well as the old Chicago Company and the rest) shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any * * * *privilege or immunity* ever * * * enjoyed by *any of them* may be necessary for the protection of their respective creditors or mortgagees * * * :"

But the section goes on to say that the exercise of "*their separate* privileges and *immunities* shall be suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require."

In other words, *the merged or consolidated company has no immunity.*

The old constituent companies resume their *separate immunities* when the protection of the separate creditors of the old company requires such resumption, such immunity being in suspense in the meantime.

The statute expressly giving them the power to resume their immunities temporarily for an express purpose, they are forever lost for any other purpose. As it is expressly provided they shall be resumed to protect original creditors of the constituent company, they cannot be resumed to protect creditors of the merged company.

But if this were not the effect of the statute by necessary implication, the language is express that, except where resumed for this explicit purpose, the immunity of the old company is *suspended*, to be brought into life only for this particular purpose.

In no part of the act is there any provision creating in express language or by necessary implication any immunity in its creature, the consolidated company.

The only immunity claimed to exist in any of the old charters is the immunity from regulation of charges by the city below a certain price.

But we do not need the language of section 9 to uphold our contention.

Appellant is insistent that the consolidated company is not a *new* company. It makes no difference whether it be

called *new* or not. It is certain that it exists only by virtue of coming under the act of 1897, and derives its corporate existence only by virtue of that act, whether the consolidation or merger now before the court makes a new company or not. It is certain that the consolidated company, being the creature of the act of 1897, must derive any immunity from regulation by the express and clear language of the act itself.

Georgia Banking Co. v. Smith, 128 U. S., 174, and cases before cited.

Furthermore, if the pretended immunity claimed to be derived from the act of 1865 were not wiped out by the terms of section 9, nevertheless the Supreme Court of the United States has settled forever the principle that immunities from public regulation enjoyed by constituent companies do not go to consolidated companies or successor companies, or to companies that succeed by purchase, assignment, foreclosure, or any other form of transfer, except by explicit language.

Such an immunity is personal to the original corporation and does not pass.

Unless there is express language to the contrary in the original charter or in the statute permitting the merger, etc., immunities belonging to the old company do not pass by sale, assignment, foreclosure, merger, etc.

Memphis, etc., R. R. v. Commissioners, 112 U. S., 609.

Wilson v. Garver, 103 U. S., 417.

Chesapeake & Ohio R. R. v. Miller, 114 U. S., 176, reading on pages 184 and 186.

Morgan v. Louisiana, 93 U. S., 217.

Dorr v. Beidleman, 125 U. S., 689.

R. R. Co. v. Maine, 96 U. S., 499.

St. Louis, etc., R. R. v. Berry, 113 U. S., 465.
Keokuk, etc., Ry. v. Missouri, 152 U. S., 301.
Hoge v. R. R. Co., 99 U. S., 354–'5.
Shields v. Ohio, 95 U. S., 323.
R. R. Co. v. Georgia, 98 U. S., 359–'62.
L. & N. R. R. v. Palmer, 109 U. S., 244.
Norfolk & W. R. R. v. Pendleton, 156 U. S., 667.
St. L. & San Francisco Ry. Co. v. Gill, 156 U. S., 649.
Covington Turnpike Co. v. Sanford, 164 U. S., 586–'7.
Yazoo & Miss. V. Ry. Co. v. Adams, 180 U. S., 1.

The decisions in some cases that, under the language of some statutes permitting consolidation, there was no new corporation, that the old corporations continued and the immunities of each old company continued to be enjoyed in the *territory only* of the old company, do not apply here.

First. Because, under the language of the act of 1897, the consolidated company is the creature of the act alone, and is not the same company as either of the constituent companies, and

Second. Because, as we have seen, the language of our statute expressly provides that the immunities of the constituent companies shall cease, except when temporarily necessary for an express narrow purpose.

On this general principle the court says, in *R. R. Co. v. Georgia*, 98 U. S., reading on page 364:

> "What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes into existence under a fresh grant. Not only

its being, but its powers, its franchises and immunities, are grants of the legislature which gave it its existence.

"If, then, the old Atlantic and Gulf Railroad Company and the Savannah, Albany and Gulf Railroad Company went out of existence when their stocks were consolidated under the act of the legislature of 1863, their powers, their rights, their franchises, privileges and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidated act of 1863. That act created a new corporation, and endowed it with the several immunities, franchises and privileges which had previously been granted to the two companies, but which they could no longer enjoy.

"It necessarily follows that the new company held the rights granted to it under and subject to the law as it was, when the new charter was granted. And the Code of the State, which came in force on the 1st of January, 1863, before the charter was granted, contained the following provision:

"'SEC. 1051. Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified or destroyed at the will of the creator; they are called corporations.'

"'SEC. 1082. In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.'

"No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the State to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the Code became, in substance, a part of the charter (*Railroad Company v. Maine*,

96 U. S., 499). It is quite too narrow a definition of the word 'franchise,' used in the statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So it was held in *The Central Railroad & Banking Co. v. Georgia* (54 Ga., 401), and so it must be held now, especially in view of the statutory provision of the Code, that private corporations are subject to be changed, modified or destroyed at the will of their creator. Hence the exemption from taxation, except to the extent and in the mode designated in the charter, could be withdrawn without any violation of the State's contract with the company, and the act of 1874 was such a withdrawal."

The Supreme Court says on the general principle, in *St. Louis & San Francisco Ry. v. Gill*, 156 U. S., reading on page 656:

"The supreme court of the State, 54 Arkansas, 101, as we learn from the record in this case, was of the opinion that the power to alter and amend charters, reserved to the State in its constitution, was not parted with or controlled by the subsequent act of the legislature incorporating the railroad company and authorizing it to establish rates, and that accordingly the passage of a subsequent general law, prescribing rates, could not be deemed an infringement of a contract between the State and the company.

"We do not find it necessary to express an opinion on this view of the case, but prefer to base our judgment on another ground, which will bring us to the same result. It has been frequently decided by this

court that a special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute (*Morgan v. Louisiana*, 93 U. S., 217; *Wilson v. Gaines*, 103 U. S., 417; *Chesapeake & Ohio Railway v. Miller*, 114 U. S., 176)."

To the same effect is the decision in *Norfolk & W. R. R. v. Pendleton*, 156 U. S., reading on page 673. The court says:

"It may be added, perhaps unnecessarily, that even apart from the clause which in terms subjected the Atlantic, Mississippi and Ohio Railroad Company, and consequently the Norfolk and Western, as its successor, to the general law prescribing rates, that there was no clause or provision in the original charters which can be interpreted as necessarily meaning that subsequent corporations, organized under later laws, can assert a valid succession to immunities and privileges like those in question. We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize as a new corporation subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon

an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris* (*Morgan v. Louisiana*, 93 U. S., 217; *Wilson v. Gaines*, 103 U. S., 417; *Chesapeake & Ohio Railway v. Miller*, 114 U. S., 176)."

In *Covington Turnpike Co. v. Sanford*, 164 U. S., 578, the Kentucky legislature conferred upon the company certain immunities as to rates to be charged. Subsequently the company was permitted to change into two companies, "each company possessing and retaining all the powers, rights, and capacities" granted to the original company. It was claimed that this language carried to the new companies the immunity from State regulation of charges. The court says, reading on page 586:

> "The act of 1834, having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as fourteen per cent. upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851, and which, by the terms of that act, succeeded 'to all the powers, rights and capacities' granted by the act of 1834, to the original corporation. This view was properly rejected by the court of appeals of Kentucky. It was well said by Judge Pryor, speaking for that court, that 'the liability and duties owing the State and the public by the one corporation had been severed by the act of 1839, and by the act of 1851 two new corporations were created, with the rights and powers of the one entirely distinct from the other, and no means of ascertaining what per cent. the old corporation would have made upon its

stock. In fact, the old corporation was extinct, and to hold that the new corporation were exempt from legislative interference would be to restrain the exercise of legislative power by implication, when a reasonable construction of the new grants must lead to a different conclusion.'

"These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. There are positive rights and privileges, this court said in *Morgan v. Louisiana*, 93 U. S., 217, without which the road of a corporation could not be successfully worked, but immunity from taxation is not one of them. In a recent case, *Norfolk & Western Railroad v. Pendleton*, 156 U. S., 667, 673, we had occasion to say, in harmony with repeated decisions, that 'in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to *new corporations succeeding, by consolidation or* by purchase under foreclosure, to the property and ordinary franchises of the first grantee;' and that this was a 'salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact

and express requirements of the grant construed *strictissimi juris* (*Morgan v. Louisiana*, 93 U. S., 217; *Wilson v. Gaines*, 103 U. S., 417; *Chesapeake & Ohio Railway v. Miller*, 114 U. S., 176).'

"The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation, established by authority of law, for the construction of a public highway. It is of the highest importance that such control should remain with the State, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature, if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of 'the powers, rights and capacities' granted to the corporation of 1834, the legislature intended to exempt the new corporations, as it did the original one, from all legislation that would prevent them from earning as much as fourteen per cent. on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate and ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication; and if a contract with a State, relating to the exercise of franchises, is susceptible of two meanings, 'the one restricting and the other extending the powers of a cor-

> poration, that construction is to be adopted which works the least harm to the State' (*The Binghampton Bridges*, 3 Wall., 51, 75; *Ruggles v. Illinois*, 108 U. S., 526; *Stein v. Bienville Water Supply Company*, 141 U. S., 67, 80, 81)."

So, the act of 1897 must be construed in favor of the public, and the language of section 9, even if not explicit, must be construed as providing that all *immunities* of the constituent companies going into the consolidated company are lost, except for the express, narrow, temporary purpose enumerated.

The court, in *Yazoo & Miss. V. Ry. Co. v. Adams*, 180 U. S., p. 1, reviews many of the cases already cited, and reaches the same conclusion. Nothing therein modifies the opinion in the Covington Turnpike case. The decision simply strengthens our position. The court in the Yazoo case, reading on page 22, says:

> "Exemptions from taxation (public regulation of rates) are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature."

No such intent appears in the act of 1897, and nothing is said in the charters of the old People's Company that its immunities (if any) shall go to any successor or merged or consolidated company.

Appellant argues that these authorities are not in point in this proceeding, but we submit that there is no specific language in the act of 1897 either creating immunity in what it creates, the consolidated company, or providing that any immunity of any constituent company shall survive after the merger, either in general or simply in the territory of the constituent company originally enjoying the

immunity, and therefore the principle settled in these cases applies absolutely—that in the absence of express language the immunity is lost.

Under these decisions it is certain that *the most* the company could claim (if the language of the act did not suspend all immunities of the merged companies) is that the present People's Company retained the immunity of the old People's Company in its original territory.

But this contention is untenable for various reasons:

I. The statute expressly wipes out this, with all other immunities (except as resumed to protect the old People's Company creditors).

II. Appellant concedes that what is claimed to have been a contract is lost when the company takes advantage of the act of 1897, and sets up that a new contract is created by section 11 of that act, which makes a new rate, perpetually, for $1.00.

But this act does not expressly provide that any immunity shall remain fixed to the territory of any old company.

III. Unless otherwise expressly provided by the act of 1897, any rate charged must be uniform throughout the territory of the consolidated company.

As to the original territory of the old People's Company, if its charter, subsisting after 1865, have any exclusive territorial force after the merger, the court will read the last part of section 3:

> "But ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said gas company for gas."

This is because nothing in the language of section 11 of the act of 1897 expressly gives the *merged company* the right to charge the minimum rate called for, free from municipal control, and *no language whatever* preserves to any of the *constituent companies any immunity* in its *original territory;* and as nothing in the act deprives the city of its right of control, reserved in the company's charter of 1865, we have the first part of the last clause of section 3 of that charter remaining in full force and the last part, the old ambiguous addition, destroyed, even if it once conferred immunity.

This leaves the naked provision that the consolidated company shall not charge a higher rate than $1.00 in the first instance, and that the city can thereafter at any time regulate such rate, the limit being reasonableness.

The facts set up in appellant's bill, where the city has granted permits to the consolidated company to open streets to lay gas mains, etc., could in no event be held to be a consent of the city to any claim of immunity which the company might make.

Appellant claims that under section 11 of the act of 1897 its company derives a new contract; that under that section the company's old right to charge $3.00 is lost, and a new contract is vested in it whereby it is forever entitled to charge $1.00 free from regulation or control.

The only recital in the section as to price is as follows:

> "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation and merger."

It is conceded for the purpose of the argument that that price is $1.00.

But there is no provision that the consolidated company shall, during the life of its charter, have the right to charge this minimum rate of the preceding year perpetually, or that no municipality shall have the right at any time during the life of the charter of the consolidated company to fix the rate to be charged at less than the minimum rate for the year preceding the consolidation.

Moreover, under the provisions of the constitution of 1870 the legislature cannot, since 1870, pass an act giving any class of corporations immunity from public control.

By article 2, section 14, the constitution provides:

> "No * * * law * * * making any irrevocable grant of special privileges or immunities shall be passed."

By article 4, section 22, of the constitution, clause 22 provides that:

> "SEC. 22. The General Assembly shall not pass local or special laws in any of the following enumerated cases; that is to say, for * * *
>
> "Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

Under these clauses section 11 cannot have the effect claimed by counsel.

APPELLANT'S BRIEF.

Appellant in its brief cites many authorities where the value of contemporaneous exposition is discussed, and claims that the opinions of certain corporation counsels of the city have been to the effect that the gas company had a contract whereby the price of gas could not be regulated by the city, etc.

Counsel have taken the pains to cite some of these opinions.

It would be most dangerous, in interpreting public powers, to give to the fugitive papers issued by public officers, on many occasions drawn to meet a temporary condition or idle question, the force of judicial decisions. It may well be that in matters of routine no danger would result.

But that the powers of public-service corporations should be determined by these fugitive papers would be a menace to public rights.

The necessities of politicians, the great political power exerted by many of such corporations in the community, the lack of publicity surrounding the issuance of such papers, all of these features and many others attending the issuance of similar papers render their use in determining questions of governmental power a most hazardous experiment. Moreover, the papers cited by appellant show on their face, most of them, the haste with which they were prepared.

We submit that the most useful purpose subserved in referring to them is to show that this power of regulation was always an agitated question in the city council.

Where questions of doubt arise as to what the law is, such expositions might be useful, where no governmental power as to these public-service corporations was involved; but we

submit that when the law is so well settled by this court on all the questions involved in this appeal, the papers relied on by counsel cannot overcome the uniform decisions of this court.

In a case arising in Chicago concerning the licensing power of the city it was urged that the city officials had pursued a certain course for a long time upon a certain theory of the law (based on opinions of the corporation counsel, if you please), and that such "contemporary exposition" should govern the court's decision, but the court declined to be so guided.

The court says:

> "It is stated that the city council have heretofore construed the ordinance in question according to the construction now placed thereon by appellee, and it is urged that by reason of such fact the city is bound by such construction. We do not agree with such contention. In *People v. Village of Crotty*, 93 Ill., 180, which was an application for *mandamus* to compel respondent to issue a license to the relator to keep a dramshop and pool table, on page 190 it is said: 'It is no answer to what we have here said, that appellee issued licenses to others under the same circumstances that it refused them to appellant, nor is it material that it may have placed its refusal to issue them to appellant upon an improper ground. The fact that appellee may have improperly issued licenses to others by reason of a want of authority to do so, could afford no possible reason why it should issue them to appellant, and if appellee had no right to issue them, it was wholly immaterial upon what ground it placed its refusal.'"
>
> *Harrison v. The People ex rel.*, 195 Ill., reading on page 473.

So the fact that preceding corporation counsels have mistaken the law could not by any rule of interpretation give appellant an immunity against the city's governmental power.

Appellant's Claim under the Act of 1897.

Counsel claim in various portions of their brief that because the People's Company's name is retained, and because the merger took the form of each of the other companies merging with the People's, therefore the present consolidated company retains all of the immunities of the original People's Company, and that those immunities are superimposed by the mere act of merger upon the territory of the other original companies, which were not burdened with these pretended immunities.

The court below apprehended the dangerous character of this claim, and we submit that the statement of it defeats itself.

Several of the constituent companies, notably the original company of all, the Chicago Gas, Light and Coke Company, dating from 1849, had no claim or color of claim of immunity.

Therefore, for illustration, we have a consolidation made up of three companies: "A," with an immunity from control below the sum of three dollars; "B," with an immunity from control below one dollar, and "C," without immunity.

Without the act of 1897 no merger could take place. Under that act they consolidate, and for reasons they retain the name of "A" and their papers take the form of the other two merging with "A."

For the year prior to the merger "A" had charged three dollars. The consumers in the territory of "B" enjoyed

gas at a price of one dollar, and those in the territory of "C" could secure a lowering of rate by the council whenever such lowering should be necessary to reach a reasonable price.

Counsel argues that by virtue of this immunity resting in "A" and because the form of merger into "A" was preserved the consolidated company would have the right, under section 11 of the act of 1897, to impose this rate of three dollars on the territory of the other two companies, perpetually. We submit that the legislature could not impose such a hardship, even by express language, yet, if appellant's position is correct, that is the effect of the law of 1897.

Counsel strive to escape from the extraordinary nature of the claim by stating that appellant had voluntarily lowered the rate to one dollar, that this is a fair rate, and the legislature gave the consolidated company the power claimed, having in view that fact.

But that statement will not stand.

If the law is as appellant claims, its rights would be the same as if it had never lowered below three dollars.

According to its logic, all the gas magnates had to do was to retain in the merger the name of the high-charge corporation, to evade perpetually the lower limit enjoyed in the territory of the one company and the subjection to public control enjoyed by the consumers of the third company.

In order to maintain the position that the legislature had in mind the dollar limit, appellant must admit that the talented agents of the gas company took the legislature into confidential relations and whispered into their willing ears certain corporate secrets, namely, that the People's Company name was to be retained, the consolidated company would go by that name, that all other companies were to be merged

therein. That this act was to be passed particularly to enable the Chicago companies to make this merger, that the aforesaid magnates would retain the People's name, instead of that of the older company, the Chicago Company, because there was a supposed fighting chance to claim a contract for high charge in the one case, which was utterly wanting in the other, and that really and candidly (if for no other and more forcible reason) one dollar was a very nice and fair and gentlemanly price to foist on the people of Chicago perpetually.

But counsel would not admit that the legislature reached the knowledge, by this devious method, that one dollar was to be the charge of the new merged company and would be a reasonable price of gas for the people of Chicago to pay perpetually, nor would the court listen to such an argument if offered. But when the court rejects the argument it rejects appellant's case.

Because the legislature could in no other way be aware of the plans and schemes of the gas magnates, and because the act of 1897 must, by virtue of the constitution of 1870, apply to the entire State, and because, as we argue elsewhere, the language of the act cannot be construed to confer on the companies taking advantage of the act any contract whatsoever as to rates, we submit that the decree of the circuit court should be affirmed.

Moreover, if the court were to consider at all the claim that the legislature intended by the act of 1897 to foist any contract on the communities of the State, the court would at least demand that the fact must appear in the act itself in unmistakable language, explicit and certain.

Nothing is more apparent in public matters than the growing tendency to protect the public against the selfish schemes and grasping tendencies of public-service corpora-

tions. It is but an evolution keeping pace with the universal increase in wealth and with the great increase in population.

In the early days so small was the patronage of public-service corporations and so costly all methods of manufacture and transportation that new communities, especially in the West, were willing to make all sorts of concessions to secure the establishment and operation of these public utilities in their midst.

With the increase in the patronage attendant upon great populations and the attendant increase in wealth and decrease in the expense of building and operation, a change has become imperative.

Prices reasonable and proper before and in the sixties become oppressive and exorbitant and unconscionable today.

Instead of communities struggling to get such corporations to perform these public services, the struggle is on the part of the corporations to secure the privilege of operation. No sooner is one of them established than it seeks by legislation, by cabal, and by every method, legal and illegal, by pools, associations, consolidations, and trusts, to secure unconscionable advantages as to rates, charges, and monopolies.

To meet these aggressions and protect itself, the public is on the strain at all times and the courts are kept busy in the defense of the public rights.

It is for this reason, among others, that this court has enforced the rule that no grant giving immunity from public control can be upheld except by the most explicit and unmistakable language.

It is notable in this connection, as before stated, that the act of 1897 was passed after this same original People's Company had attempted to amalgamate with most of these other

companies into what was called the Chicago Gas Trust, and the Illinois supreme court, in the 130 Ill., had defeated the purpose.

This consolidated company was the result of the passage of this act.

Agreeably to the uniform usage in such cases, this legalized monopoly immediately sets up in itself and for itself immunity from public control as to rates throughout the entire city, although on the face of its bill it appears that in some instances, notably in that of the Chicago Gas Company, the constituent companies have not even the color of such a claim.

The construction claimed by appellant, that the merging company whose name is retained shall impose its immunity on all the territory of the merging companies, even where no immunity was originally granted, and thus force upon a community a fixed high price, where it was enjoying a low price by original ordinance, or a regulated price, would be most sinister, and such a construction by this court would invite such legislation that public rights, so far as this class of corporations is concerned, would quickly disappear.

Appellant's reiterated arguments as to the intention of the legislature to protect these helpless corporations from public regulation sound hollow in the light of present conditions.

The law has always protected corporate rights from such fancied danger. Public regulation must always be reasonable.

It needs but a slight insight into public affairs now to see that the legislature's protection of the public, not of the public-service corporations, is what is lacking.

Counsel argue that the city never before attempted to lower the price of gas, and attempt to draw some comfort from that fact.

It may well be that by the careful policy of the old company in voluntarily reducing its prices from time to time the evil day was postponed.

Also it is evident that until a recent date the price of one dollar was a reasonable price.

The record shows that an actual increase of expense occurred between 1855 and 1865, brought on, of course, by the high war prices and the debased currency of that day. Evidently from the high-water-mark rate of 1865 to one dollar was a gradual process. The bill alleges it was a voluntary reduction.

This voluntary giving up would scarcely have taken place, but that such course caused a postponement of the assertions of this right by the city council.

For the same purpose, evidently, were the compromises ending with that of 1899, set out in the bill, where the company contracted to pay the city a percentage of its gross receipts.

So between compromises and "voluntary" reductions and the opinions of certain conservative gentlemen no ordinance was actually passed and became a law until the year 1900, and now counsel claims that this compromise-induced delay constitutes, with the conservative opinions, a contemporaneous exposition equal in force to the decisions of this court.

But there is nothing to this claim, because, even if the council's non-assertion would prove anything, appellant must first show that the price of one dollar had become unreasonable many years ago, and that the city council refrained from reducing the price to a reasonable figure, because it recognized that it had no right so to do before any non-action of the city council could have any bearing on the question.

Counsel refer to the bill prepared by the city council and attempted to be passed, giving cities the right to regulate gas on the lines of the old statute giving them the right to regulate water rates. They claim that the attempt to pass the act is a confession that we did not before have the power. No such deduction can be fairly drawn.

It would ordinarily take less time to get an act passed where the language was so specific that the most grasping monopoly could not question its import than to get a decision from the highest court on the present acts.

There is no confession in trying to save time.

But we are glad that counsel have reminded the court how blithely the legislature gave to appellant and its friends the act of 1897, enabling them to create forbidden monopoly, and how this act, clearing up all question as to the power of the public to fix reasonable rates, was defeated. Appellant is welcome to all the comfort it may get from the comparison.

Learned counsel cite a large number of cases, but we respectfully submit that none of them hold contrary to the well-defined decisions relied upon by us.

The line of decisions from various States cited, where various acts have been construed as not giving the regulating power, would be valuable were it not that this court has passed fully on all the issues involved.

The New Orleans Gas case, 115 U. S., seemingly relied on by appellant to uphold his contention as to the act of 1865, we submit, is not in point for counsel, because the act of 1865 does not, in the set terms required by this court, make a contract.

The legislature, not having seen fit to make a contract itself, could not bind future legislatures not to make one. There is nothing in the New Orleans Gas case that controverts this position. There, there was a contract in terms.

If the legislature of 1865 had in unambiguous language granted the old gas company a contract, the 115 U. S. case would apply. But the legislature declined to give a contract (appellant admits that it retained the right to regulate), and we submit that it could not stipulate what future legislatures would or would not do as to a governmental power such as this.

The New Orleans case passes on a fixed and unambiguous contract.

Counsel again seem to take great comfort in a finding of the appellate court of Illinois in the Hale case, 94 Ill. Appellate; but the reasoning in that case is contrary to the findings of this court, and under the law of the State the decisions of the appellate court are not authoritative.

We urge therefore that the decision of the court below be affirmed for the reasons stated.

Neither the old People's Company under the act of 1865 nor the consolidated company under the act of 1897 derive any immunity from regulation, according to the decisions of this court.

The city derives the power to regulate under the act of 1865, and has never lost the same. And, again, under the law of 1871–'2, the cities and villages act.

It is impossible, we submit, to deny the city's right to regulate under the history of the adoption of the clause *sub-thirteenth*, and after the decision in the Freeport Water

case, sustained by the others cited by us and followed by the Joplin and Owensboro decisions.

To hold that under the act of 1897 a high-price corporation could swallow up low-limit corporations and thereby impose its high rates in the low-rate territory would be to encourage fraud and corporate greed throughout the land.

Respectfully submitted.

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EDGAR B. TOLMAN,
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Of Counsel.

APPENDIX A.

OPINION OF JUDGE GROSSCUP, PUBLISHED JULY 30, 1902.

"I have considered with great care the arguments, both oral and printed, submitted on the rehearing, and see nothing that ought to change the opinion already filed, or the order that followed.

"The only serious question is whether, in view of the recent decision of the Supreme Court of the United States in the Detroit Traction case, the Gas Consolidation Act of 1897, is to be held to embody a contract between the State and the complainant, whereby, from that time forth, gas was to be furnished by the complainant at a fixed rate, unalterable by either party without the consent of the other. The language of the section relied on is as follows: 'Such corporation (the consolidated corporation), shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger.' It is averred that such price for the 'year immediately preceding,' was not less than one dollar per thousand.

"If this rate thus named in the act was meant as a maximum rate only, the Detroit case does not apply; if it was meant, however, as an agreed rate unalterable by either party, the decision does apply.

"The Detroit case announced no new law. It is fundamental that no city or State can constitutionally enact any legislation that impairs the validity of existing contracts. The Detroit case merely held that under the legislation of Michigan the ordinance rate named, though in words a maximum rate only, must be regarded as an agreed fixed rate. The decision does not modify the previous decisions in Illinois water cases where similar language in water ordi-

nances are construed as maximum rates only. The question involved, therefore, is not so much a question of constitutional law as a question of interpretation; namely, what was the legislative intent in the enactment of the Gas Consolidation Act of 1897?

"The act was not special, applying to complainant only. It applies to every gas company and to every city in the State. It contains no mandate, as in the Detroit case, that there shall be an agreed constant rate. It is preceded by no legislation looking to such constant rate. Its language, therefore, must be given its plain ordinary significance; and so construed, I can see in it no purpose other than to fix, not a rate unalterable by either party, but a rate beyond which the consolidated companies may not go. To give it any other interpretation would be to import into the act a strained and artificial meaning.

"I agree with counsel that neither city nor State must be allowed to run over plain contract rights. Against attempts of that kind the courts have always stood as a wall of defense. But it is equally important that no just right of the State should be impaired, nor a meaning put into its legislation that was not intended. When it comes to ascertaining what are the boundaries of the powers of the State, the courts must not forget that there are boundaries to their own powers as well.

"The demurrer to the amended bill will be sustained and the bill dismissed upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois."

Supreme Court of the United States.

No. 132.—October Term, 1903.

The People's Gas Light and Coke Company of Chicago, Appellant, *vs.* The City of Chicago.	Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[April 4, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a bill to restrain the city of Chicago from putting in force a general ordinance passed October 15, 1900, providing that corporations, companies or persons manufacturing, selling and distributing gas in the city of Chicago for illuminating or fuel purposes should not charge individual consumers more than seventy-five cents per thousand cubic feet, and providing penalties for violation of its provisions. The bill was demurred to, and an opinion delivered on hearing on demurrer. 114 Fed. Rep. 384.

The opinion took a wider range than the bill as framed called for, because of certain facts not therein set forth, but which were admitted on the argument, and accordingly it was suggested that the bill be amended to bring in these facts, and, this having been done, the demurrer was renewed to the amended bill, whereupon, after argument, the court gave an additional brief opinion, (which appears in the record,) sustained the demurrer and dismissed the bill as amended for want of jurisdiction. Subsequently it was stipulated and agreed by and between the parties that the decree as entered did not correctly recite what was intended by the court, and that it should be amended by striking out the words "for want of jurisdiction," and inserting in lieu thereof the words "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois." An order was then entered by the court, amending its previous decree *nunc pro tunc* in the particulars named.

The facts presented by the amended bill were these: The People's Gas Light and Coke Company was incorporated by a special act of the general assembly of Illinois, approved February 12, 1855, creating it a corporation, with the usual powers and liabilities, with a capital stock not to exceed $500,000, and with power to manufacture and sell gas in the city of Chicago and "to lay pipes for the purpose of conducting the gas in any of the streets

or avenues of said city, with the consent of the city council," and by the fourth section it was expressly provided that the company should furnish and supply to the city, for its public uses, at the election of the proper authorities of the city, "a sufficient supply of gas, at a rate not exceeding two dollars per thousand feet, and the inhabitants of said city at a rate not exceeding two dollars and fifty cents per thousand feet." The city council passed an ordinance, August 30, 1858, granting the company permission and authority "to lay their gas mains, pipes, feeders and service pipes in any of the streets, avenues, highways, public parks or squares throughout said city, subject at all times, however, to the resolutions and ordinances of the common council of said city." The act of 1855 was amended February 7, 1865, so as to allow an indefinite increase of the capital stock, and by section three of this act all the corporate powers of the corporation were vested in a board of directors and such officers and agents as the board should appoint, with power to the board to "adopt such by-laws, rules and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this State," the section continuing and concluding, "and the fourth section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

In 1870 a new constitution of the State of Illinois was adopted, providing that no law "making any irrevocable grant of special privileges or immunities shall be passed," Art. II, § 14; that the general assembly should not pass local or special laws "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever," Art. IV, § 22; and that no corporation should be "created by special laws, or its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the State, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created," Art. XI, § 1.

June 5, 1897, an act was passed "in relation to gas companies," which authorized and empowered gas companies to sell, transfer, convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and provided that by complying with the provisions of the act, gas companies doing business in the same city, town or village might consolidate and merge into a single corporation, which should be one of said merging and consolidating corporations. "The companies, parties to the agreement or agreements, which provide for consolidation and merger

shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements." Laws Illinois 1897, p. 179, §§ 2, 8.

The ninth and eleventh sections read as follows:

"§ 9. Any corporation purchasing or leasing the real and personal property of any other company or companies, as provided for in section 1, or any consolidated corporation, as authorized by section 2, shall be subject to and shall perform, for each of the companies so entering into said agreement or agreements, the legal obligations now resting upon each of them, respectively, under their respective charters and ordinances, except where the provisions thereof conflict with the exercise of the powers herein granted, in the same manner and to the same extent as if the companies had remained individual and distinct; and such performance by said corporation so purchasing or leasing, or by such consolidated corporation, shall be held and considered as the performance by each of the respective companies so selling, leasing or consolidating, of the legal obligations theretofore resting upon each of them respectively: *Provided, however,* that nothing in this act shall be construed as extinguishing said companies entering into the agreement or agreements mentioned in this act, or annulling or impairing any of their respective franchises, licenses or privileges, but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity ever exercised or enjoyed by any of them, may be necessary for the protection of their respective creditors or mortgagees, or any of them; the separate exercise of their respective powers, and the separate enjoyment of their separate privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require."

"§ 11. Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions:

"Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation and merger.

"Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease or such consolidation and merger."

The People's Gas Light and Coke Company under this act became consolidated with some ten other gas companies, most of which were organized under general laws passed in pursuance of the constitution of 1870. One of them, the Chicago Gas Light and Coke Company, was incorporated by special act of February 12, 1849, amended February 9, 1855, but this contained no restriction on the right of the general assembly or the city to regulate the price of gas from time to time.

The bill quoted from the eleventh section of the act of 1897 the clause in reference to the increase of price for gas of the quality furnished consumers

during any part of the year immediately preceding purchase or lease, or consolidation and merger, and alleged the fact to be that during the year immediately preceding the acquisition by complainant of the various other gas companies, complainant charged the net rate or price of one dollar per thousand cubic feet, and since the acquisition of the plants and property of those corporations that complainant had uniformly charged the same net rate or price for gas sold by it in the city, which gas was better in quality and of higher candle power than the gas theretofore sold by the companies acquired; and complainant averred, as matter of law, that the price or rate thus fixed was a fixing and regulating by the State of the price or rate to be charged by complainant for gas supplied subsequent to the acquisition of said other companies.

The bill also set forth an agreement made between the city and the People's Gas Light and Coke Company, July 20, 1899, which recited that agreements had theretofore subsisted between the city and the People's Company, and between the city and certain other gas companies, which companies subsequently became merged into the People's Company, and provided for a continuance of the lighting of the streets on the same terms as it had been done, and for the payment by the People's Company to the city of a certain percentage of the gross receipts of the People's Company from the sales of gas during 1899, including therein the receipts from the operation of the properties of each of the gas companies consolidated with the People's Company, and for the payment by the city of amounts due or to become due to the People's Company or confession of judgment for amounts remaining unpaid; and the bill further set forth certain orders of the city between August 5, 1897, and March 11, 1901, for the laying of pipes and mains by the People's Company in the streets and avenues of the city. Certain mortgages were likewise referred to and it was alleged that bonds thereunder had been sold to parties who purchased the same in the belief that the city was prohibited by its charter from compelling the People's Company to furnish gas at a less rate than three dollars per thousand cubic feet.

The bill also averred that the People's Company, prior to the consolidation, distributed gas chiefly in the west division of the city, although its pipes and mains extended into the south division, and that the other companies, or nearly all them, severally had plants and were engaged in manufacturing and distributing gas in various other sections of the city.

On March 5, 1900, the city council passed an ordinance which provided "that no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used."

The jurisdiction of the Circuit Court was invoked on the ground of impairment or deprivation by the ordinance of contract rights of complainant acquired by its charter, and the bill prayed, among other things, "that it may be adjudged and decreed that by said charter of the People's Gas Light and Coke Company, the people of the State of Illinois agreed with the People's Gas Light and Coke Company, that the common council of the city of Chicago should never be authorized to compel the People's Gas Light and Coke Company to furnish gas at a less rate than 83 per thousand cubic feet, and that such contract is a valuable property right of the said People's Gas Light and Coke Company."

The Circuit Court declined to specifically dispose of complainant's contention that by the act of February 7, 1865, the State had contracted that the city should never require the company to furnish gas at a less rate than three dollars per thousand feet, because it held that the limitation or exemption, even if conceded, did not apply to the territory and rights acquired by the merger, and that the bill did not seek divisional relief, and was not framed in that aspect; while most of the consolidated companies were organized under the general incorporation law passed in pursuance of the constitution of 1870, and the right to fix reasonable rates was reserved, the works not having been installed under any explicit contract to the contrary, if such could have been entered into.

As to the clause of the eleventh section of the act of June 5, 1897, providing: "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger," the Circuit Court ruled that this did not fix a rate unalterable by either party, but a rate beyond which the consolidated companies could not go.

The Circuit Court further held that the contention that the State's power to regulate rates had not been delegated to the city was not a Federal question, and that as the ground of impairment or deprivation of contract rights acquired by the charter failed under the bill as framed, the court could not go further and decide that question in this case. While the decree, as it stands, amended by consent, in terms reserved the question to be raised in some other appropriate suit in a proper court.

In these circumstances we are constrained to decline the consideration of that question so far as it relates to the contention that power to regulate was conferred by the general law of Illinois of 1871–2 providing for the incorporation of cities and villages under which the city of Chicago as now constituted was incorporated.

But the decree dismissed the bill "as to the alleged contract rights of complainant," and in so doing the Circuit Court dealt with the alleged fixing of rates by the act of 1897 as well as with the alleged contract of 1865 that the city should not be authorized to fix a rate of less than three dollars, for

although, as we have said, it was the impairment or deprivation of the latter which was made the ground of Federal jurisdiction, it was in effect as asserted to have been modified by the act of 1897. We agree with the Circuit Court that the clause of section eleven of the act of 1897, that "such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger," read according to the plain and ordinary signification of the words, it being a general law applicable to every gas company and to every city in the State, was not intended to fix and did not fix a rate unalterable by either party, but simply a rate above which consolidated companies could not go. This disposes of it as an independent ground of relief, and leaves to be considered the provision of the amended charter of 1865, that "ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet," as affected by the act of 1897. That is to say, was the city cut off from reducing the price below one dollar, conceding the power of the State to do so?

It is contended, on the one hand, that the first part of this provision granted the city the general power to regulate the price after ten years, and that the latter part then ceased to operate as a restriction. And, on the other hand, that the whole clause constituted a contract that the general assembly would not thereafter authorize the city to fix the rate at less than three dollars. But it is expressly conceded that the general assembly possessed the power to regulate the price of gas and to prescribe reasonable rates, and that, as complainant availed itself of the act of 1897, and thereby acquired the plants of other gas companies, it can now only charge the rate it had been charging the year immediately preceding the acquisition of those properties, namely, one dollar per thousand cubic feet.

Assuming, but without intimating any opinion to that effect, that by the amended charter of 1865 the State contracted with the People's Gas Light and Coke Company that the city should not thereafter be empowered to reduce the price of gas below three dollars per thousand feet, the preliminary inquiry is whether by the consolidation that contract was extended to the plants of and territory occupied by the companies absorbed.

The Circuit Court held that it was not so extended, and that as the bill sought relief in respect of the entire plants and territory, the entire system as consolidated, it could not be maintained because there was no such contract which the ordinance impaired or destroyed.

It is said that partial relief might have been accorded unless by the consolidation the alleged exemption was lost, but the bill was not framed in

the alternative, and the ordinance itself did not contemplate a divided operation, although if the exemption existed as to part of the system the ordinance would not necessarily be wholly void but might be held inoperative *pro tanto* notwithstanding serious difficulties in so applying it. See *Chesapeake and Ohio Railroad Company* v. *Virginia*, 94 U. S. 718, and cases cited.

Was the alleged exemption extended by the act of 1897, when the other companies were acquired?

Prior to that time the operations of the People's Company were practically confined to the West Division of the city, and although it was empowered to lay pipes in any of the streets or avenues, this was only with the city's consent. The city in 1858 authorized the company to do this, but this was "subject at all times" to the city's resolutions ard ordinances.

It is true that after the acquisition of the other companies the city compromised with the People's Company in respect of claims for gas furnished, and also ordered the company to lay mains in streets which formerly did not have them, but this action was not equivalent to consent to the extension of the alleged restriction on rates to territory acquired under the merger, with the accomplishment of which the city had nothing to do.

The act of 1897 provided that the consolidated corporation should be subject to the legal obligations of the companies taken over, and most of these were not exempt from the right of regulation, and were obliged to submit to its exercise.

By the State constitution the general assembly was forbidden to make "any irrevocable grant of special privileges or immunities," and the general rule is that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute. *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 656; *Norfolk & Western Railroad Company* v. *Pendleton*, 156 U. S. 667; *Covington Turnpike Company* v. *Sanford*, 164 U. S. 586; *Minneapolis & St. Louis Railway Company* v. *Gardner*, 177 U. S. 332; *Georgia Banking Company* v. *Smith*, 128 U. S. 174. And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided. So that the act of 1897 cannot be construed as extending any prior immunity the acquiring company possessed over the whole system of all the companies consolidated.

And if not, and the Circuit Court was right, as we think it was, in holding that under the present bill complainant's alleged exemption could not be enforced as to so much of the system as originally belonged to it,

then the court was justified in declining to discuss whether by the consolidation the alleged exemption was lost altogether.

In short, agreeing with the Circuit Court, we are of opinion that the asserted immunity, (conceding it *arguendo*), did not extend to so much of the system as passed to the consolidated company from companies not possessing such immunity in their own right; that under this bill relief could not be accorded in respect of part of the system; that no contract that the price of gas should not be reduced below one dollar per thousand feet was created, nor was the alleged original exemption merely modified and extended; and that the decree dismissing the bill because there were no such contract rights as alleged impaired or destroyed by the ordinance was right.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.